Updates
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Protecting Internal Investigation Materials From Disclosure

In *United States ex rel. Wollman v. Massachusetts Gen. Hosp., Inc.*, No. CV 15-11890-ADB, 2020 WL 4352915 (D. Mass. July 29, 2020), yet another district court agreed with the U.S. Court of Appeals for the District of Columbia Circuit's decision in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014), holding that, although the defendants waived it here, attorney-client privilege applies to internal investigations.

While the district court's decision should provide comfort to white collar and corporate compliance attorneys, it should also serve as a warning regarding the importance of following best practices for protecting privilege and the often limited application of the work product doctrine in the context of internal investigations.

Easy to Recite, Often Hard to Apply

The elements of the attorney-client privilege, "while easy to recite, are often hard to apply." *Wollman*, 2020 WL 4352915, at *11. As a reminder, attorney-client privilege applies so long as these basic elements are met: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.

Under the U.S. Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), and, more recently, the D.C. Circuit's decision in *In re Kellogg Brown & Root, Inc*, the attorney-client privilege should apply to internal investigations.[1] In *Kellogg*, the plaintiff/relator brought a claim against a defense contractor for allegedly defrauding the federal government, and, in vacating the district court's order finding that the contractor must produce internal investigation materials related to the subject matter of the complaint, the circuit court held that the contractor's prior internal investigation into the alleged fraud was protected by attorney-client privilege because a primary purpose of the investigation was to provide or obtain legal advice.

Absent an exception, disclosing attorney-client communications to a third party waives the privilege. Exceptions are narrowly construed. For example, the *Kovel* doctrine provides an exception for third parties employed to assist an attorney in providing legal advice (e.g., accountants and financial advisors), but the third party's involvement must be, at minimum, highly useful for effective representation and "the communication must be made for the purpose of obtaining legal advice from the lawyer." *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

The work product doctrine applies more narrowly than attorney-client privilege in that it applies only in the litigation context, but it does not require the provision of legal advice. In short, the work product doctrine shields from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative. . . ." Fed. R. Civ. P. 26(b)(3)(A). Disclosing a document protected by the work product doctrine to a friendly third party generally does not waive the protection, unless the disclosure materially increases the opportunity of subsequent disclosure to a litigation adversary. However, unlike the attorney-client privilege, the work product protection from disclosure is not absolute even without waiver.

Privilege—but not Work Product Protection—Attached to Investigation Report, but Disclosure to Public Relations Firm Waived the Privilege

In *Wollman*—where, as previously noted, the district court held that attorney-client privilege applies to internal investigations—the plaintiff/relator brought a *qui tam* action under the federal False Claims Act (FCA) alleging that the defendants fraudulently billed Medicare and Medicaid for overlapping and concurrent surgeries. *Qui tam* , which translates to "in the name of the king," allows persons with evidence of fraud against the federal government to sue the alleged wrongdoer on behalf of the government pursuant to the FCA. As part of the action here, the plaintiff sought to compel the defendants to produce a report issued by an attorney (Stern) as part of an internal investigation conducted in response to earlier criticisms made by a surgeon employed by one of the defendants (Massachusetts General Hospital or MGH) regarding the practice of overlapping surgeries. The plaintiff contended that the report was not privileged because Stern was hired to conduct a fact investigation and not to provide legal advice. The plaintiff further asserted that even if the report was privileged, the defendants waived privilege (1) when they provided the report to a public relations firm (Rasky) to help respond to an investigation by *The Boston Globe* into overlapping surgeries, and (2) by sending a copy of the report to MGH's chair of the board at her email address for Simmons University, where counsel for the university found it in connection with responding to a subpoena in a separate matter. As part of the proceeding, the court conducted an *in camera* review of the report and associated documents, including interview memoranda prepared during the investigation.

The court held that the report and related documents were not protected by the work product doctrine because defendants failed to show that the report was prepared in anticipation of litigation or for use in litigation. The court noted that the work product doctrine does not apply simply because "the *subject matter* of a document relates to a subject that might conceivably be litigated." *Wollman*, 2020 WL 4352915, at *9. That a company may be concerned that a party "might bring litigation sometime in the future is not sufficient to qualify for attorney work product protection." *Id.*

In contrast, the court held that the attorney-client privilege applied to the report. It did so principally for four reasons. First, the engagement letter stated that Stern would be providing "legal representation." The letter also implied that Stern would be working with in-house counsel and was hired to address legal issues in connection with the investigation. Second, the report was labeled "Confidential Attorney Client Privileged Communication" and related to concerns regarding potential violations of billing regulations and exposure to legal liability. Third, the client interviews conducted in connection with the report focused on areas that raised issues of potential liability and the associated memoranda were labeled as privileged and confidential. Fourth, the deposition transcripts prepared in discovery indicated that those involved with the decision to hire Stern did so with the understanding that counsel would be investigating claims of legal violations.

Although the court held that attorney-client privilege applied to the report, it determined that MGH had, in part, waived privilege based on its production of the report to its public relations firm, Rasky. The court found that the *Kovel* doctrine did not apply because Rasky did not assist in consultations between MGH and its attorney and its involvement did not relate to obtaining legal advice. Rasky was retained to provide advice in the context of *The Boston Globe*'s reporting on overlapping surgeries, which occurred three to four years after Stern conducted his investigation. The court also rejected the defendants' argument that because Rasky served as the "functional equivalent" of an employee, the privilege extended to Rasky. The court determined that Rasky was a consultant rather than an agent of the defendants because it was hired only for specific projects, worked out of its own offices, and worked for other clients.

As to the scope of the waiver, the court concluded that it should be limited to the report, any materials provided to Rasky, and any communications with Rasky regarding the report. It is well settled that waivers can, by

implication, extend beyond the matter revealed. But the court did not find subject-matter waiver here because the defendants did not use the extrajudicial disclosure of the report to gain an advantage against the opposing party.

Lastly, the court held that the alleged disclosure of the report to counsel for Simmons University (via disclosure of the report to the board chair using her Simmons University email address) did not constitute waiver because it was unclear whether counsel reviewed the report and absent such review, there was no actual disclosure of privileged information to a third party. But, even if counsel had reviewed the report, the court determined that such disclosure would not waive privilege because, among other things, the email attaching the report and the report itself were marked as privileged and there was no evidence that counsel disseminated the report.

Key Takeaways to Protect Privilege in Internal Investigations

To avoid the problems faced by defendants in *Wollman* and protect privilege in internal investigations, attorneys conducting internal investigations—and companies engaging such attorneys—should consider these key takeaways from the *Wollman* decision:

- Ensure attorney involvement in and oversight of the internal investigation.
- Do not expect the work product doctrine to shield internal investigation materials from disclosure as a matter of course; reasonable anticipation of litigation is required. If litigation is anticipated, ensure document preservation occurs concurrently with the internal investigation.
- Provide legal advice, such as analysis of allegations of legal wrongdoing and recommendations for policy and practice changes, even if such advice is not included in the final report.
- Clearly communicate from the outset, including in the engagement letter and investigation plan, that the purpose of the investigation is to provide legal advice to the client.
- Relatedly, maintain a record of the investigation team's communications with in-house counsel and/or management apart from both the investigation itself and delivery of the final report. Such a record can support a finding that the purpose of the investigation was to provide legal advice.
- Use privilege legends judiciously and provide and memorialize *Upjohn* warnings to witnesses at the start of interviews, clarifying that the investigating attorney represents the company and is conducting the interview in order to provide legal advice to the company and instructing the witness to keep the interview confidential.
- Keep investigative materials, including reports and interview memoranda, confidential and share them only on a need-to-know basis and with parties clearly within the privilege.
- Finally, ensure that the method of disclosure of investigative materials reasonably maintains the confidentiality of the materials. *Wollman* illustrates that providing investigation materials to a person within the privilege via a potentially unsecure mode of communication (here, the board chair's unrelated work email address) may result in a waiver if third parties access those materials. In the current remote work environment in the COVID-19 era, ensuring the confidentiality of communications takes on particular significance and requires understanding the technology being used.

As *Wollman* shows, attorneys who fail to follow best practices to protect internal investigation materials from disclosure at the outset of the investigation risk not only *in camera* review or disclosure of the material they seek to protect, but also broad subject-matter waiver beyond the material disclosed.

Endnotes

[1] *See also Edwards v. Scripps Media, Inc.*, No. 18-10735, 2019 WL 2448654, at *1–2 (E.D. Mich. June 10, 2019) (following *Kellogg*); *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prod. Liab. Litig.*, No. 1:17-MD-2775, 2019 WL 2330863, at *2 (D. Md. May 31, 2019) (same); *Pitkin v. Corizon Health, Inc.*, No.

3:16-CV-02235-AA, 2017 WL 6496565, at *4 (D. Or. Dec. 18, 2017) (same); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529–30 (S.D.N.Y. 2015) (same).

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