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In his July 23, 2014 “Privilege Points” release, Tom Spahn discusses privilege protection for internal investigations:

Last week's Privilege Point described the District of Columbia Circuit Court of Appeals' articulation of a privilege standard very favorable to companies conducting internal investigations. In In re Kellogg Brown & Root, Inc., No. 14-5055, 2014 U.S. App. LEXIS 12115 (D.C. Cir. June 27, 2014), the appeals court also found the privilege applicable despite involvement of nonlawyers in conducting interviews, and those interviewers' failure to give interviewed employees the classic Upjohn warnings or confidentiality agreements mentioning legal advice.

Commentators applauding the D.C. Circuit's decision generally overlook an equally significant issue -- what the court did not say. The lower court's rejection of Kellogg Brown & Root's (KBR) privilege claim also rested on the absence of any request for or offering of legal advice in the investigation's email message traffic, and on the investigation report's failure to request legal advice or identify "possible legal issues for further review." United States ex rel. Barko v. Halliburton Co., Case No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 30866, at *6 (D.D.C. Mar. 11, 2014). The appeals court upheld KBR's privilege claim despite these factors -- thus implicitly rejecting many courts' increasingly common exclusive focus on withheld documents' four corners in rejecting privilege claims. See, e.g., A&R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co., Civ. No. 3:07CV929 (WWE), 2014 U.S. Dist. LEXIS 20859, at *8 n.1 (D. Conn. Feb. 19, 2014) (denying a privilege claim because "[t]here is no legal advice requested, explicitly or implicitly, in the cover letter"); Owens v. Stifel, Nicolaus & Co., Civ. A. No. 7:12-CV-144 (HL), 2013 U.S. Dist. LEXIS 171913, at *6 (M.D. Ga. Dec. 6, 2013) (denying a privilege claim because emails to and from an in-house lawyer "do not explicitly seek or contain legal advice"); Lolonga-Gedeon v. Child & Family Servs., No. 08-CV-00300A(F), 2012 U.S. Dist. LEXIS 67843, at *12-13 (W.D.N.Y. May 15, 2012) ("Nor is there any request within the text of the communication for legal advice or services and, as such, the communication is not protected by the attorney-client privilege.").

In addition to articulating a company-friendly legal standard for judging corporate investigations' motivations when assessing privilege protection, the D.C. Circuit Court of
Appeals looked beyond the investigation-generated documents' four corners. The court also examined the documents' context -- ultimately concluding that "there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice." In re Kellogg Brown & Root, 2014 U.S. App. LEXIS 12115, at *14.