District of Columbia Circuit Court Dramatically Expands Privilege Protection for Internal Corporate Investigations: Part II

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In his July 16, 2014 “Privilege Points” release, Tom Spahn discusses privilege protection for internal corporate investigations:

Last week's Privilege Point described the legal standard and some of the factual bases for the District of Columbia District Court's denial of privilege protection for Kellogg Brown & Root's (KBR) internal corporate investigation. This week’s privilege point tells the good news -- when about three months later, the D.C. Circuit Court of Appeals issued a writ of mandamus reversing the District Court's holding. In re Kellogg Brown & Root, Inc., No. 14-5055, 2014 U.S. App. LEXIS 12115 (D.C. Cir. June 27, 2014).

The District of Columbia federal appellate court first rejected the district court's legal standard, holding that the privilege could protect a company's investigation if its need for legal advice was one of the "primary" or "significant" motivating purposes – even if not the only purpose, or the primary purpose. Id. at *13-14. The appeals court also explicitly addressed several factual indicia the district court relied on, holding that (1) KBR's requirement under government regulations to investigate alleged fraud did not preclude KBR's argument that another "significant purpose[]" was seeking legal advice; (2) nonlawyers could conduct privileged employee interviews while "serving as agents of attorneys"; (3) the absence of Upjohn warnings did not prevent privilege protection, because "nothing in Upjohn requires a company to use magic words"; and (4) although the employees' confidentiality agreements did not "expressly" mention KBR's need for legal advice, employees knew the law department was conducting a "sensitive" investigation and were warned not to discuss their interviews without KBR's General Counsel's authorization. Id. at *8-10.

The appeals court's legal standard represents a much more privilege-friendly approach than most courts apply. The standard permits companies to claim privilege protection even for investigations they must undertake pursuant to external requirements -- rather than having to initiate parallel or successive investigations to gain the protection. And the court's analysis of the factual issues provides a much more lenient standard for claiming privilege than most courts would apply. Next week's Privilege Point will discuss what the D.C. Circuit Court of Appeals' decision did not address.