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Attorney-Client Privilege

Preserving Privilege During Internal Probes Becomes Trickier After 'KBR', Other Rulings

The ongoing litigation between KBR and whistleblower Harry Barko and other cases suggest that the attorney-client privilege is under siege, an attorney said May 5.

''Courts definitely are making somewhat ominous inroads into the previously sacrosanct area of privilege,'' said Gail Zirkelbach, a Los Angeles based partner in Crowell & Moring LLP. ''The good news is that as courts are doing so, they are defining specific factors and procedures which can be employed to protect the privilege or to maximize your chances of success'' at asserting the privilege.

The cases also illustrate that the way internal investigations are conducted continues to be in a ''complete state of flux,'' Zirkelbach added. ''One thing is clear—the days of being able to conduct an internal investigation without being worried about planning and attention to detail are long gone.''

Key Cases. Zirkelbach and other Crowell & Moring attorneys spoke at a government contractor conference in Washington hosted by the law firm. They discussed several cases, describing them as the most important developments in recent case law with respect to the attorney-client privilege and internal investigations.

The cases are:

- *In re Kellogg Brown & Root Inc.*, a June 2014 decision by the U.S. Court of Appeals for the District of Columbia overturning Judge James Gwin's decision that KBR had to turn over 89 documents sought by Barko.
- *In re Kellogg Brown & Root Inc.*, an ongoing appeal in which the D.C. Circuit is reviewing Gwin's decision, on remand, that KBR still had to produce the documents. Oral argument in the case is scheduled for May 11 (103 FCR 284, 3/17/15).
- *Wal-Mart Stores Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, a July 2014 decision in which the Delaware Supreme Court ordered the megastore to turn over internal documents about what directors and officers knew about alleged bribes made by executives at its subsidiary in Mexico. A hearing on a contempt motion is scheduled for May 7.
- *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479, 2013 BL 312486, in which the bank was sued by the family of two individuals, one of whom was killed and the other injured in a suicide bombing in Tel Aviv. The family, alleging that the bank provided material support and resources to a terrorist organization, sought documents relating to its anti-money laundering compliance procedures and investigations. The U.S. District Court for the Southern District of New York partially granted the motion to compel in an October 2013 decision.
- *Paterno v. NCAA*, in which a Pennsylvania court in September 2014 ordered the trustees of Pennsylvania State University to turn over certain documents obtained during the university's internal investigation of the Jerry Sandusky scandal conducted by outside counsel Freeh Sporkin & Sullivan LLP.

Engagement Letters. Among other comments, Preetha Chakrabarti, an associate in Crowell's New York office, noted that the *Paterno* court reviewed the ''scope of engagement'' section of Freeh's engagement letter in concluding that the firm's communications were privileged only to the extent that it was retained to provide legal services. Accordingly, companies should take extra care in drafting engagement letters, she said.

Companies also should beware of subject matter waiver, Chakrabarti said. She noted that the *Paterno* court concluded that the defendants had waived their privilege by using the Freeh report both as a shield and sword by, among other actions, making the report publicly available.

Zirkelbach added that the cases are an important reminder that the attorney-client privilege is a ''privilege'' and accordingly, steps must be taken to protect it and to ensure that it adheres. She also noted that looking forward, there likely will be an increase in judges ''who are willing to take that step and find a waiver'' of privilege ''in circumstances where previously other judges have not.''

Protection Tips. Zirkelbach offered several tips in protecting privilege during internal investigations:

- *Investigations must be conducted by or at the active direction of legal counsel*. Active direction involves more than just a passive authorization of the probe, she said.
- *Be careful in the use of non-attorney agents*. Companies must ensure that non-attorney agents act at

the direction of counsel and for a specific legal purpose, she said.

- *Document the specific legal purpose for every investigation*. To improve your chances of successfully asserting privilege, use buzzwords such as ''in anticipation of litigation'' where possible, to differentiate the material from advice to the board or as part of compliance with regulatory requirements, Zirkelbach said.
- *Other communications, including e-mail or verbal statements, should also be documented to show a legal purpose*.
- *Give proper 'Upjohn' warnings to employees during internal investigations*. In addition, people who interview the staff should be instructed to give the warning and to document that it was given at the time of the interview, Zirkelbach said.
- *When conducting the investigation, keep in mind the jurisdictional principles that could apply*. If possible, bifurcate the international and domestic aspects of the probe, she said.

''Remember that you're going to have the burden of proving the privilege exists,'' Zirkelbach told the audience. Conversely, companies must ensure that they don't inadvertently waive the privilege during litigation ''by making arguments'' that could ''open the door to a waiver argument by the other side,'' she said.

Jason Lynch, an associate in Crowell's Washington office, also suggested that when conducting internal investigations, companies should try to put themselves in the shoes of someone who is looking in hindsight at the probe. Document the issues that are discussed and ''always treat everything as if it's going to be inspected by a judge'' or someone trying to contest the privilege of the documents at issue, he said.

SEC Anti-Retaliation Stance. In other remarks, Justin Murphy, a counsel in Crowell's Washington office, referred to the $130,000 fine imposed by the Securities and Exchange Commission on KBR, allegedly for using improperly restrictive language in its confidentiality agreements that could stifle the whistle-blowing process. The employer also had to revise the language in the agreements to state that employees do not need the prior approval of the law department to report potential violations to the government or have to notify the company after making a report.

According to Barko's attorney, the SEC initiated its investigation of KBR's agreements after a February 2014 tip that Barko provided to federal officials.

The SEC's administrative case serves as a warning for all employers, Murphy said. He noted that other regulators, including the Equal Employment Opportunity Commission, are reviewing employment agreements to see if they impede an employee's ability to report wrongdoing to the government.

There are two takeaways for companies from these developments, Murphy continued. One is that at a minimum, employers should review their existing policies to ensure they are not incurring ''undue risks'' in trying to walk that ''fine line between preserving privileges'' and protecting confidential information, versus being perceived by regulators as improperly hindering employee informants, he said.

The other is that employers, using a facts-and-circumstances approach, may still want to retain the notification provision in their agreements, Murphy said. If they do retain the provision that the whistle-blower must notify them after making a report to the government, they should pair it with anti-retaliation language stating that the notification is not intended to be an impediment to whistle-blowing, he added.

Murphy said there are very important reasons as to why companies may want to keep the notification language. One is that it allows the company to conduct an internal investigation of the allegations or to participate fully in any investigation conducted by the government, whether the SEC or the U.S. Department of Justice, he said. The other is that it allows the company to promptly assert the attorney-client privilege if necessary.

Whether companies want to keep the notification provision depends on their risk tolerance, Murphy said. He observed that some companies, reluctant to put themselves in the SEC's cross hairs, have adopted language similar, if not identical, to that of KBR's revised agreement. However, the SEC's position on retaliatory language hasn't yet been tested in court, and ''this is really an area in flux,'' he said.

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  FCR ISSN 0014-9063