



## D.C. Circuit Prevents Disclosure of KBR’s Internal Investigation Materials, *Again*

For the second time in as many years, the Court of Appeals for the D.C. Circuit struck down a district court order compelling KBR to turn over documents from an internal investigation conducted by KBR into allegations that it defrauded the U.S. government during the Iraq War. The district court initially ruled that KBR’s internal investigation documents were not privileged because they were not prepared primarily for the purposes of seeking legal advice. Finding the documents privileged, the D.C. Circuit vacated that ruling and remanded to the district court, noting that the issue was “materially indistinguishable” from U.S. Supreme Court precedent in *Upjohn Co. v. United States*. But the district court, at the D.C. Circuit’s invitation, entertained other timely arguments as to why the privilege should not attach, and once again it ordered disclosure of the internal investigation documents. The D.C. Circuit, however, disagreed and for a second time upheld privilege over the internal investigation documents, cautioning that the district court’s reliance on the balancing test for Federal Rule of Evidence 612, the doctrine of “at issue” waiver, and the “substantial need” test “inject[ed] uncertainty into application of the attorney-client privilege and work product protection to internal investigations.”

### Background

KBR designated Vice President Christopher Heinrich as its Fed. R. Civ. P. 30(b)(6) witness on several identified topics, including a topic addressing any investigation or inquiry of the alleged fraud or any of the matters identified by the relator. At the outset of Heinrich’s deposition, counsel for KBR offered a preliminary statement noting that KBR was making Heinrich available subject to claims of attorney-client privilege and work product protection.

During Heinrich’s deposition, he testified that he reviewed the now-disputed documents relating to KBR’s internal investigation in preparation for the deposition. On cross-examination by counsel for KBR, Heinrich testified that KBR had a contractual duty to report to the Department of Defense (“DoD”) if it had reason to believe any violation of the Anti-Kickback Act may have occurred. He also explained that when KBR had made such reports to DoD in the past, that it had treated the investigation itself as privileged and never provided a copy of the investigation itself to the government.

Shortly after the deposition, KBR moved for summary judgment. KBR's memorandum in support of summary judgment acknowledged KBR's practice of making disclosures to the government where an investigation revealed reasonable grounds to believe a violation may have occurred. The memorandum also acknowledged that KBR intended for its investigations to be protected by privilege but noted that it had not asserted privilege over the fact that internal investigations have occurred or the fact that KBR had made disclosures to the government based on those investigations. Finally, the memorandum acknowledged that KBR performed an investigation related to the relator's claims and made no disclosure to the government following that investigation. The memorandum also attached excerpts from Heinrich's testimony and referenced the deposition language in the Statement of Material Facts to Which there is No Genuine Dispute.

Applying a balancing test, the district court on remand found that KBR had to produce the documents under Federal Rule of Evidence 612 on the basis that KBR waived privilege when Heinrich reviewed the documents in preparation for his deposition. The district court also found that KBR impliedly waived privilege under the "at issue" doctrine. After rejecting KBR's request to amend its pleadings to strike the sections that created a waiver, the district court issued a separate order finding that the documents were discoverable fact work product and the relator had shown "substantial need."

## Waiver Based on Review in Preparation for Deposition

On appeal from the district court's second ruling, the D.C. Circuit found that the district court erred in applying a balancing test under Federal Rule of Evidence 612. The D.C. Circuit noted that the Rule 612 balancing test applies only where a document is used to refresh a witness's memory. In other words, the writing must have influenced the witness's testimony to be discoverable.

Heinrich did not consult the materials during his deposition, nor did he testify as to the substance of those documents or any other privileged element. Further, as noted by KBR's

counsel during the deposition, while Heinrich reviewed the materials prior to the deposition, the company "would not concede that it was for the purpose of refreshing recollection so that he could testify because [KBR has] always consistently taken the position that those reports are subject to the company's attorney-client privilege and attorney work product." The D.C. Circuit agreed and refused to find testimonial reliance to justify application of the balancing test.

Moreover, the D.C. Circuit also held that, even if consideration of the balancing test had been appropriate, the district court erred in its application of that test. Noting that in most cases, 30(b)(6) witnesses who examine privileged materials before testifying will not waive privilege, the district court nonetheless found that fairness dictated disclosure here because of Heinrich's and KBR's repeated suggestion that the documents contain nothing. The D.C. Circuit rejected the district court ruling because it failed to give due weight to the privilege and protection attached to the internal investigation materials and because it would allow privilege claims over internal investigations to be routinely defeated by noticing a deposition on the topic of the privileged nature of the investigation. This result would directly conflict with *Upjohn*, which teaches that an uncertain privilege is little better than no privilege at all. The D.C. Circuit also found the relator's position that KBR erred by producing a 30(b)(6) witness that had actually reviewed the internal investigation materials "absurd" because such a rule would encourage parties to provide less knowledgeable corporate representatives.

## Implied or "At Issue" Waiver

The D.C. Circuit also rejected the district court's conclusion that KBR impliedly waived any protection over the documents in dispute because it actively sought a positive inference in its favor on what it claimed the internal investigation documents showed. The district court reasoned that KBR attempted to use its privilege claim as a sword and a shield by using the fact that it conducts investigations and makes disclosures when it has reasonable evidence of a violation to establish an inference that it had no reasonable evidence of a violation here, since it conducted an investigation but did

not make a disclosure. The district court further emphasized that KBR itself had put the materials “at issue” when it solicited Heinrich’s testimony on the materials, attached excerpts from the testimony to its motion for summary judgment, referenced the deposition language in its statement of material facts to which there is no genuine dispute, and discussed the “investigative mechanism” in its brief.

Acknowledging that the attorney-client privilege cannot be used as both a sword and a shield, the D.C. Circuit also recognized that general assertions lacking substantive privileged content are insufficient to justify waiver. As to the deposition testimony and the statement of material facts, the D.C. Circuit found that “as a matter of logic—neither could possibly give rise to an inference that places the contents of the deposition at issue.” The deposition is merely a record of what Heinrich said, not an argument, and the statement of material facts does not create any inferences to be made or contested in the statements alone. The D.C. Circuit did, however, recognize that waiver could occur during a deposition or statement of material facts where partial disclosure of privileged materials was made.

The D.C. Circuit went on to note that the reference to the investigation in the summary judgment memorandum presented a more difficult question because “a factfinder could infer that the investigation found no wrongdoing.” Nonetheless, the D.C. Circuit rejected the district court’s position that KBR was asking it to draw an “unavoidable” inference—that the investigation uncovered no wrongdoing. Instead, the D.C. Circuit opined that a different inference could be made—that the investigation showed wrongdoing but KBR made no report to the government. Further, the circuit court noted that because all inferences were to be drawn against KBR in its motion for summary judgment, the district court could not make any inference in KBR’s favor based on the contents of the privileged documents. In other words, the district court was prohibited from even making the most favorable inference that it concluded was “unavoidable.” In any event, the D.C. Circuit noted that the memorandum merely included a recitation of facts, not an argument or claim concerning the privileged materials.

## “Substantial Need”

Finally, the D.C. Circuit disagreed with the district court’s order directing KBR to produce certain portions of the report on the basis that the materials were nonprivileged fact work product discoverable based on substantial need. While agreeing with the district court on the law, and rejecting KBR’s assertion that everything in an internal investigation is protected by the attorney-client privilege, the D.C. Circuit found that the district court misapplied the law to the documents it ordered to be disclosed.

The circuit court concluded that even a cursory review demonstrated that many of the documents were protected by the attorney-client privilege and that other documents contained the mental impressions of the investigators. Thus, the district court committed clear error in concluding that the materials were only fact work product. Because the district court failed to distinguish between fact and opinion work product, the circuit court did not reach the “substantial need” and “undue hardship” questions.

## Recommendations

While the D.C. Circuit’s ruling reaffirms the protections from disclosure provided by the attorney-client privilege and work product doctrine, as a matter of practice, counsel should carefully consider its approach before conducting any internal investigation. Counsel should be especially mindful that materials that qualify as work product, but that do not fall under the attorney-client privilege, may be subject to disclosure, especially when the materials constitute fact work product. Further, counsel should be careful in its public use of or reference to privileged or work product protected investigative materials so as to avoid impliedly waiving protection. Likewise, counsel should advise 30(b)(6) witnesses not to disclose the contents of such investigative materials when providing testimony. While statements regarding the existence of such materials generally will not result in waiver, revealing the substance of those materials likely will.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

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