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Inside

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The D.C. Circuit: Wrong and Wronger!

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On October 28, 1980, Ronald Reagan won the Presidency (and I bet *NY Business Law Journal* readers thought national elections only took place on the first Tuesday in November). In the sole Presidential debate of that campaign, and in response to one of President Carter's desperate broadsides attempting to depict the former California Governor as a political troglodyte, Reagan ruefully looked over at his opponent, shook his head sadly, and said: "There you go again." With that devastating rebuke, Carter was effectively done, the polls which had shown a neck-and-neck race underwent a sea change, and Reagan was overwhelmingly elected a week later.[1]

Reagan's famous one-liner applies with equal (if not greater) force to the United States Court of Appeals for the District of Columbia. In 2014, that distinguished court made a horrendous ruling; in 2015, it doubled down with another one, in the same litigation.

The First Time: Not a Charm

On June 27, 2014, the U.S. Court of Appeals for the D.C. Circuit handed down, in one commentator's opinion, "one of the most important decisions in recent memory concerning internal investigations."[2] Unfortunately, the D.C. Circuit in *In re Kellogg Brown & Root* got it wrong.[3]

The litigation arose out of allegations that a major defense contractor's employees had given "preferential treatment" to a subcontractor in exchange for bribes. Prior to the litigation and on its own initiative, the defense contractor, employing its "Code of Business Conduct" protocols, had initiated an internal investigation; it was conducted by non-lawyers. Those non-lawyer employees "interviewed personnel with potential knowledge of the allegations, reviewed documents, and obtained witness statements." Upon completing their investigation, the non-lawyers wrote up seven reports, which were then forwarded on to the defense contractor's internal legal department.

Thereafter, in subsequent *qui tam* litigation, the plaintiff sought the seven reports in discovery. The defense contractor demurred, citing the attorney-client privilege and the attorney work product doctrine. Upon a motion to compel, the U.S. District Court for the District of Columbia conducted an in-camera review of the materials and then ruled that neither position held water.

The District Court Gets One Right, but One Wrong

As to the work product argument, the district court observed both (i) that the investigation was conducted by non-lawyers—not at the direction of counsel, and (ii) that it was not undertaken in anticipation of litigation. That analysis was clearly correct, and it proved not to be controversial.

On the attorney-client privilege issue, the district court ruled that a "party invoking the privilege must show 'the communication would not have been made *but for* the fact that legal advice was sought.'"[4] Citing Department of Defense requirements of self-disclosure of improper conduct, the court found that the "but for" standard had not been met. The court also noted (i) that the "employees who were interviewed were never informed that the purpose of the interview[s] was to assist the [defense contractor] in obtaining legal advice;" and (ii) that the "employees certainly would not have been able to infer the legal nature of the inquiry by virtue of the interviewer[s], who [were] non-attorn[eys]."[5]

The defense contractor was extremely unhappy with this latter ruling, asked the district court for an interlocutory appeal on the privilege issue *only* (which was denied),[6] and then petitioned the D.C. Circuit for a writ of mandamus on that one issue (which was granted). Obviously, the grant of mandamus was a sure sign that the district court's privilege ruling was not long for this world. But would the D.C. Circuit get it right?

The D.C. Circuit Gets One Right, and Five Wrong

The speed with which the circuit court took on and resolved the case had underscored the serious concern at hand with the district court's ruling. Indeed, in the higher court's view, the lower court's decision not only had the potential to "disable most public companies from undertaking confidential internal investigations," it had also so fundamentally misunderstood and misinterpreted the Supreme Court's seminal ruling in *U.S. v. Upjohn Co.* that the decision "threaten[ed] to vastly diminish the attorney-client privilege in the business setting."[7] Unfortunately, not only were those dire consequences not well-founded, the D.C. Circuit's analysis justifying reversal was wide of the mark as well—with one exception.

So what did the higher court get right? In rejecting the district court's "but for" test, the circuit court was right-on in observing that such a test "is not appropriate for [an] attorney-client privilege analysis"; the court was also spot-on that there is "no Supreme Court or Court of Appeals decision that has adopted a test of this kind in this context."[8] Unfortunately, that was all that the D.C. Circuit nailed correctly.

What did the circuit court miss? Not much in fact, only that: (i) it did not understand the basic and fundamental precepts underlying the privilege; (ii) it misap-

plied *Upjohn*; (iii) it confused the attorney-client privilege with attorney work product; (iv) it did not understand lawyers' ethical duties in these circumstances; and (v) it flouted the law vis-à-vis interlocutory appeals.

It is axiomatic that client communications with non-lawyers, especially non-lawyers not acting under the specific guidance of lawyers (pursuant to Fed. R. Civ. P. 26(b)(3)), are not confidential, privileged, or protected from discovery.[9] Thus, when the D.C. Circuit wrote that the case before it was "materially indistinguishable" from *Upjohn*, it was simply wrong; in the court's own words: "In *Upjohn*, the communications were made by company employees to company attorneys during an attorney-led internal investigation[,]"[10] which clearly was not the situation in the case before the D.C. Circuit, and no amount of invoking the policy underpinnings of *Upjohn* can change that structural problem. As compliance personnel and internal auditors are regularly told (even those who are licensed lawyers), this privilege does not apply to them or to their communications. Period.

By its frequent "cf" citations, and most particularly its citation to *Hickman v. Taylor*[11]—the seminal Supreme Court decision underpinning the attorney work product doctrine and Fed. R. Civ. P. 26(b) (3)—it seems apparent that the D.C. Circuit was confusing the attorney-client privilege with the work product doctrine. If, in fact, the defense contractor's legal department had established the internal investigation in anticipation of litigation and had specifically designated the non-lawyer personnel as its agents to assist lawyers in the investigation, then the work product generated would have been protected—not under the privilege, but instead under the work product doctrine.[12] It is indisputable, however, that that is not what happened in this case.

With respect to the failure to inform employees that the interviews were of a legal nature, the circuit court's ethical antennae were clearly turned off. The court was simply wrong in stating: "nothing in *Upjohn* requires a company to use *magic words* to its employees in order to gain the benefit of the privilege for an internal investigation...*here as in Upjohn* employees *knew* that the company's legal department was conducting an investigation of a sensitive nature *and* that the information they disclosed would be protected."[13]

Unlike in *Upjohn*, the defense contractor's employees certainly did *not* know of the legal department's role or involvement; and as for the interviewees' confidentiality expectations, how would (or could) they have had an informed view on that subject? Lawyers were not conducting the interviews, and thus were not giving the employees the "magic words" required by the canons of ethics, i.e., the Corporate Miranda Warning—to warn them that, in fact, the information they were disclosing might well not be confidential or protected.[14]

As if that were not enough, the circuit court then correctly cited to binding Supreme Court precedent that "an interlocutory appeal under the collateral order is *not available* in attorney-client privilege cases."[15] It also correctly noted that taking a contempt citation is the only appropriate means to get immediate appellate review.[16] Nonetheless, believing (wrongly) that it had to step in because "the District Court's decision [had] the potential to 'work a sea change in the well-settled rules governing internal corporate investigation,'"[17] the circuit court convinced itself that "granting the writ [was] 'appropriate under the circumstances.'"[18]

Well, that is a lot to get wrong.[19] Little did I think that the D.C. Circuit would compound those errors in the same case fourteen months later!

The Second Time Around: Dumb and Dumber To

On August 11, 2015, the same appellate court (albeit a different panel[20]) took on a later facet of the Kellogg Brown & Root (KBR) saga, and this time drove the car into a different ditch.[21] On a second writ of mandamus from an adverse ruling from the district court, the defense contractor was (again) able to get the higher court to block discovery into obviously damaging materials relating to alleged wrongdoing.

In February 2014 (one month after the original district court decision and five months before the first opinion of the D.C. Circuit), the defense contractor had put forward for a Rule 30(b)(6) deposition a lawyer in its internal legal department. Among the topics the internal lawyer was to testify about (as a corporate officer on behalf of the organization, per Fed. R. Cir. P. 30(b)(6)) was:

> Any investigation or inquiry, internal or external, formal or informal, of [the KBR employee and subcontractor at the center of the alleged fraud] or any of the matters identified in [the above listed topics]. The scope shall include knowledge of everyone who participated in the investigation.

At the deposition, the KBR internal lawyer acknowledged that, in preparation for his testimony, he had reviewed the documents that had been prepared by the KBR *non*-lawyers in their investigation (and which were the subject of both appeals to the D.C. Circuit). Notwithstanding that "preparation," there were material differences between the lawyer's testimony and the contents of the investigatory materials.

Five days thereafter, KBR moved for summary judgment. And in its motion (in a footnote), KBR put forward the following piece of advocacy:

> KBR has an internal Code of Business Conduct ("COBC") investigative mecha-

> nism that provides a means of identifying any potentially illegal activities within the company. When a COBC investigation reveals reasonable grounds to believe that a violation of 41 U.S.C. §§ 51-58 (the "Anti-Kickback Act") may have occurred requiring disclosure to the government under FAR 52.203-7, KBR makes such disclosures. Stmt. ¶ 27. KBR has made reports to the Government when it had reasonable grounds to believe that a violation of the Anti-Kickback Act occurred. *Id.* KBR intends for these investigations to be protected by the attorney-client privilege and attorney work product privilege (indeed, they are not even given to the Government as part of disclosures), but has not asserted privilege over the fact that such investigations occurred, or the fact of whether KBR made a disclosure to the Government based on the investigation. Therefore, with respect to the allegations raised by [the plaintiff], KBR represents that KBR did perform COBC investigations related to [the KBR subcontractor and employee at the center of the fraud alleged by the plaintiff], and made no reports to the Government following those investigations.[22]

This motion practice led to two decisions by the district court. On November 20, 2014, the court ruled that there was an "implied waiver" of the attorney-client privilege and work product doctrine because KBR had put privileged materials at issue: "KBR has actively sought a positive inference in its favor based upon what KBR claims the documents show." In other words, (wrote the court):

> KBR carefully used the inference that the COBC documents do not support any reasonable belief that fraud or kickbacks may have occurred. KBR has, on multiple occasions, advanced a chain of reasoning. First, whenever KBR has reasonable grounds to believe that a kickback or fraud had occurred, its contracts and federal regulation required it to report the possible violation.
>
> Second, KBR abides by this obligation and reports possible violations. Third, KBR investigated the alleged kickbacks that are part of Barko's complaint. Fourth, after the investigation of the allegations in this case, KBR made no report to the Government about an alleged kickback or fraud.[23]

The district court also ruled that Federal Rule of Evidence 612 further mandated a waiver because the internal KBR lawyer had used the contested materials to prepare for his deposition; and the balancing test under that Rule (and the "fairness considerations" that underlie that Rule) required disclosure, especially given that (i) the lawyer "necessarily relied on the… documents for his testimony because he had no personal, first-hand knowledge of whether fraud or kickbacks occurred," and (ii) "major discrepancies exist between [the lawyer's] testimony and the contents of the writings [the lawyer] had received."[24]

On December 17, 2014, the district court issued a separate opinion, finding that disclosure was justified on a third basis: the disputed materials were "discoverable fact work product and [the plaintiff] shows substantial need."[25]

Two days later, KBR filed a petition for writ of mandamus, which the D.C. Circuit promptly granted, staying the implementation of the district court's decisions. With these decisions having some flaws, would the higher court merely correct them, or would it do a running dive into a shallow pool?

Starting Off on the Wrong Foot

Unfortunately, and even beyond the D.C. Circuit's decidedly wrong June 2014 ruling (which the 2015 panel of judges felt constrained to build upon as the "law of the case"), the district court's two decisions in November and December of 2014 suffered from a basic defect that helped ensure that the appellate train wreck would become even more problematic. The district court had *correctly* determined in its March 2014 decision that the investigatory materials were **not** attorney work product (the investigation was **not** conducted by lawyers, was **not** done at the direction of lawyers, and was **not** done in anticipation of litigation) and that ruling was **not** appealed to the D.C. Circuit (and thus *was* the "law of the case;") **but** the district court's more recent decisions did a complete 180 (degrees) and now labeled the materials as attorney work product, notwithstanding that they were the exact "same documents" which the court had earlier (and correctly) ruled were not work product. Thus, the entire basis for the district court's December 2014 "substantial need" decision was wrong; and the court's November 2014 "waiver" decision—to the extent it was equally premised on both the attorney-client privilege and the work product doctrine—was clearly *one* legal bridge too far.

Not understanding this basic problem with the lower court's November and December rulings now teed up to the D.C. Circuit on the writ of mandamus, the appellate court jumped back into the discovery imbroglio with both feet, hell-bent to protect KBR from its own investigatory and litigation foul-ups. What followed is not pretty.

One Potato

The D.C. Circuit first tackled the November 2014 "waiver" decision of the district court. With respect to the Rule 612 issue, the appellate court determined that (i) as a threshold matter, the district court's use of the Rule's balancing test was "inappropriate" and "clear error," and (ii) even using the balancing test, the scales weighed indisputably in favor of non-disclosure. Both prongs of that determination were, unfortunately, wrong.

For its the initial proposition, the D.C. Circuit cited Judge Weinstein's famous treatise on evidence;[26] but the treatise (and the Rule) stand for exactly the opposite proposition. First off, most courts that have looked at the use of written materials to "refresh" a witness's memory (including privileged materials and work product) have reflexively ruled that the materials are fair game under Rule 612.[27] Second, the leading case applying the balancing test—and not ordering disclosure—is *Sporck v. Peil*.[28] That case involved several hundred thousand documents, a select number of which counsel picked out, compiled, and presented to a witness prior to a deposition. When this preparatory process was revealed at the deposition, opposing counsel moved for the documents' production. The trial court granted the motion. The Third Circuit reversed, however, and did so principally on two grounds: (i) the attorney's selection of the materials reflected his own work product; and (ii) there was no evidence that the witness relied upon the documents or that they had influenced his testimony. Neither circumstance, of course, was present in the KBR situation.[29]

Third is the fact that Judge Weinstein is himself a major proponent of the balancing test; thus, the D.C. Circuit's out-of-hand dismissal of its use while citing him is quite bizarre. Furthermore, Judge Weinstein also is on record as urging lawyers *not* to show witnesses privileged materials or work product:

> In the present state of uncertainty [i.e., the policy conflict between *Hickman v. Taylor* and Rule 612], attorneys should ***not*** refresh prospective deponents or witnesses with material containing counsel's theories or thought processes. Not only may such documents ultimately fall into opposing counsel's hands if Rule 612 is satisfied, but there are too many risks of unethical suggestions to witnesses when they see such material.[30]

Finally, the D.C. Circuit's own, sort-of application of the balancing test was clearly wrong. Did the "writing influence[ ] the witness's testimony" (Judge Weinstein's words)? The answer is obviously *yes*—unless one's view is that the KBR lawyer's inconsistent testimony meant that he was not in fact "influenced" by the writing! But that was not even the rationale offered by the D.C. Circuit in support of its *no* answer. Instead, the appellate court's take was that, with KBR having chosen the in-house lawyer to be the Rule 30(b)(6) witness—a mistake in and of itself[31]—the lawyer had no choice *but* to review the investigatory materials. It then resolved the matter by labeling the plaintiff's position on waiver as "absurd;" as such, the D.C. Circuit did not even have to confront the "influence" issue, or address the fact that all of this could have been avoided by KBR putting up a corporate employee who had first-hand knowledge of the investigation in the first place.[32]

Two Potato

Having "neatly" disposed of the Rule 612 issue, the D.C. Circuit next moved on to the "at issue" waiver, arising from what KBR had argued in its summary judgment papers. "[A]t first glance," wrote the court, this appeared to present a "more difficult question."[33] But the appellate court was undeterred, finding that the seemingly obvious inference drawn by the district court— i.e., KBR was contending that: (i) it always self-reports to the government when there has been illegality; (ii) it did not do that here; and (iii) thus, there must be no evidence (privileged or otherwise) that it engaged in any illegality—was *not* what KBR was putting forward at all.

Rather, the D.C. Circuit postulated an "alternative inference": that KBR was *really* confessing "that the investigation showed wrongdoing but KBR nonetheless made no report to the government."[34] In my margin notes on the court's opinion next to this point I wrote: "Huh?!!!!" That obviously makes *no* sense. The appellate court then tried to support its "alternative inference" (a/k/a/ alternative universe) by further noting that KBR had tried this advocacy "only in a footnote," and that in any event all inferences should have been drawn against KBR on its summary judgment motion (and the district court should thus have adopted the appellate court's "alternative inference").[35] Such "reasoning" and "analysis" leave me speechless.

Three Potato

And the D.C. Circuit was not done yet. It next turned to the district court's December 2014 "substantial need" decision. Incredibly (and notwithstanding the discussion above on that decision), the appellate court determined that the lower court's 180-degree turn on work product was *correct* ("we think the District Court got the law right") but then ruled that the lower court "misapplied the law to the documents it ordered disclosed."[36]

To support those misjudgments, the D.C. Circuit made numerous, additional errors. First of all, it continued its blurring of the lines between the attorney-client privilege and the work product doctrine (continuing to cite as "controlling precedent" the *Upjohn* decision, which has nothing to do with the "substantial need" standard set forth in Fed. R. Civ. P. 26(b)(3)). Then the court mis-

cited and misapplied the *Kovel* exception,[37] as well as the "Della Street" rule of ethics.[38] As a final matter, the D.C. Circuit then faulted the lower court's failure to delineate between opinion work product and fact work product, and thus felt justified in not even reaching the question of whether the lower court had erred in its determination of "substantial need."[39] That the disputed materials were *neither* opinion work product *nor* fact work product was of no importance or matter.[40]

Conclusion

As did the prior appellate panel, the August 2015 panel felt justified in its extraordinarily wrong set of determinations because "well founded" "alarm bells" would sound in corporate America if the D.C. Circuit had not acted "in order to protect our privilege waiver jurisprudence."[41] Not surprisingly, many of the commentators the appellate court cited (often wrongly or with "Cf." citations) professed to be pleased with the August 2015 decision.[42] But the repetition (or compounding) of error does not turn a wrong into a right.[43]

The whole, sorry history of the KBR litigation got started when KBR itself did not follow the basic precepts of how to conduct an internal investigation.[44] KBR then compounded things when it also did not handle the 30(b)(6) deposition correctly. Throw on top of those errors three not-so-great district court decisions and two manifestly wrong decisions by the D.C. Circuit, and we are left with legal precedents that lawyers advising clients in this space should be *extremely* loath to follow.

Litigating privilege and work product issues is tricky enough when you handle the process correctly; handling the process incorrectly and then expecting a court to do somersaults to misapply the law in order to help you and your client out of self-imposed jams is likely to be asking too much.[45]

Endnotes

1. Steven R. Weisman, *Reagan Takes Oath as 40th President; Promises an 'Era of National Renewal, New York Times*, available at: http://www.nytimes.com/learning/general/onthisday/big/0120.html#article. That debate was also memorable for Reagan asking the American public a compelling, rhetorical question: "Are you better off than you were four years ago?" (The answer for almost every American was an emphatic "no!") Carter, by contrast, had tried to suggest Reagan would be untrustworthy in charge of the nuclear arsenal by invoking his daughter Amy. This only led to the immediate creation of a memorable political button: "Ask Amy." With its usual, unbiased reporting, *The New York Times* told its readers the next day "no clear winner [was] apparent." *Id.*
2. *See* J. McLaughlin, *Attorney-Client Privilege in Internal Investigations, New York Law Journal* (August 14, 2014).
3. *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. June 27, 2014), *rev'g United States ex rel. Barko v. Halliburton Co.*, 2014 WL 1016784 (D.D.C. March 6, 2014).
4. *Id.* at *2 (quoting *United States v. ISS Marine Servs.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012) (emphasis added)). The court also later referenced a "primary purpose" standard. *Id.* at *4.
5. *Id.* at *3.
6. *United States ex rel. Barko v. Halliburton Co.*, 2014 WL 929430 (D.D.C. March 11, 2014).
7. 756 F.3d at 762 (the first quote was taken by the Court of Appeals straight out of the defense contractor's brief). *See infra* note 14 for the formal citation to the *Upjohn* decision.
8. *Id.* at 758-60. As for the "primary purpose" test, that type of standard was a gloss that many courts attempted to impose upon Fed. R. Civ. P. 26(b)(3) with respect to attorney work product, until Judge Leval properly (and hopefully) put an end to all that in *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1988). *See* C.E. Stewart, *Hickman v. Taylor Reinvigorated by the Second Circuit, With Important Benefits for Litigants, ABA Pretrial Practice & Discovery* (July 1998). Unfortunately, Judge Furman in *In re General Motors LLC Ignition Switch Litigation*, 2015 WL 22105 (S.D.N.Y. January 15, 2015) recently adopted a "primary purpose standard" in ruling on whether the privilege applied to a General Motors internal investigation. *Id.*
9. For the privilege to exist, there must be the 5 Cs: (i) a client; (2) a communication; (3) confidentiality; (4) counsel (an attorney); and (5) counsel (the giving of legal advice by an attorney). Four out of five Cs is not sufficient; there must be all five for the privilege to exist. *See* C.E. Stewart, *"Attorney-Client Privilege: Misunderestimated or Misunderstood?, New York Law Journal* (Oct. 20, 2014).
10. 765 F.3d at 757.
11. *Id.* at 764. *See* 329 U.S. 495 (1947).
12. *See* C.E. Stewart, *Think Twice: The Good, Bad, and Ugly of Corporate Investigations, New York Law Journal* (Mar. 27, 2006).
13. 756 F.3d at 758 (emphasis added) (this is one of the "Cf." citations to *Upjohn*).
14. *See* C.E. Stewart, "Thus Spake Zarathustra (And Other Cautionary Tales for Lawyers)," *NY Business Law Journal* (Winter 2010). For purposes of lawyers complying with their ethical obligations, the Corporate Miranda Warning (Rule 1.13) does in fact contain "magic words." This warning is sometimes mistakenly called an *Upjohn* warning, as derived from the Supreme Court's ruling in *U.S. v. Upjohn Co.*, 449 U.S. 383 (1981). But this is a mischaracterization of *Upjohn*, which (i) has nothing to do with lawyers' ethical duties under Rule 1.13, and (ii) stands for the proposition that all corporate employees are covered by the corporate attorney-client privilege for purposes of discovery under the Federal Rules of Civil Procedure.
15. 756 F.3d at 761 (emphasis added) (citing *Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009)).
16. The court of appeals, however, did not view going the contempt route as an "'adequate' means of relief in these circumstances." *Id.* Why that is so is quite unclear, especially since the leading case on opinion work product was established by precisely that route. *See In re Murphy*, 560 F.2d 326 (8th Cir. 1977).
17. 756 F.3d at 762 (quoting verbatim the amicus brief of the Chamber of Commerce).
18. *Id.* at 763 (citing *Cheney v. U.S. District Court of the District of Columbia*, 542 U.S. 367, 380 (2004)), which stands for the proposition that mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes."). In support of this relief, the court also cited one of the worst opinions regarding privilege, *ever*: *In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987). *See* C.E. Stewart, *Will Waiving the Privilege Save It?, NY Business Law Journal* (Spring 2007).
19. By sheer dumb luck, I discovered that a lawyer recently employed by the Association of Corporate Counsel published a blog on the ACC website critical of my prior critique of the D.C. Circuit ruling (*see supra* note 9); in his view, I was/am "[q]uite simply... wrong." In his blog, Amar Sarwal contended (i) "the opinion makes clear that the district court's imposition of a second-class citizen status on in-house counsel is unwarranted and incorrect as a matter of law;" (ii) the opinion "also amply demonstrates that the panel is

quite familiar with privilege and work product doctrine"; and (iii) "the court of appeals only protected communications that were conducted at the direction of a lawyer and for the purpose of seeking legal advice." When I contacted Mr. Sarwal to take issue with the obvious incorrectness of each of those three propositions and to ask for equal time on the ACC website, he refused my request. I subsequently was surprised to learn that his prior employer was the U.S. Chamber of Commerce, which had quite a stake (and played quite a role) in the appeal to the D.C. Circuit on behalf of Kellogg Brown & Root. *See supra* note 17.

20. The new panel was Circuit Judges Griffith, Kavannaugh, and Srinivasan; the prior panel was Circuit Judges Sentelle, Tatel, and Wilkins.

21. *See* 796 F.3d 137 (D.C. Cir. August 11, 2015).

22. *Id.*

23. *See* 796 F.3d at 142.

24. *See id.* at 144.

25. 2014 WL7212881, at *2 (D.D.C. December 17, 2014).

26. *See* J. Weinstein & M. Berger, *Weinstein's Federal Evidence* (2d ed. 1997). The court also cited the leading balancing test decision under Rule 612: *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985).

27. *See, e.g., Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories Inc.*, 81 F.R.D. 8 (N.D. Ill. 1978); *James Julian, Inc. v. Ratheon Co.*, 93 F.R.D. 138 (D. Del. 1985); *U.S. v. 22.80 Acres of Land*, 107 F.R.D. 20 (N.D. Cal. 1985); *Leybold-Heracus Technologies Inc. v. Midwest Investment Co.*, 118 F.R.D. 607 (D. Wis. 1987); *In re Joint Eastern and Southern District Asbestos Litigation*, 119 F.R.D. 4 (E.D.N.Y. & S.D.N.Y. 1988); *Redvanly v. NYNEX Corp.*, 152 F.R.D. 460 (S.D.N.Y. 1993); *Audiotext Communications Network v. US Telecom*, 164 F.R.D. 250 (D. Kan. 1996).

28. *See supra* note 25. This case, as well as the broader issue of what can be shown witnesses as part of preparation, are the subject of my prior article: *'Positively 4th Street': Lawyers and the 'Scripting' of Witnesses, NY Business Law Journal* (Summer 2014).

29. KBR made a huge mess of this by having an internal lawyer be a Rule 30(b)(6) witness in the first place—that should *never* be done. It then compounded the error by showing him the materials KBR was so desperately trying to keep from producing to the plaintiff's lawyers. Perhaps the company was attempting to be too clever by half—putting forward its own lawyer and then attempting to bar discovery on the Rule 30(b)(6) subject by invoking privilege and work product. This should *never* be attempted by careful lawyers, unless (apparently) you are litigating such matters in the D.C. Circuit. *See* 796 F.3d 137.

30. *See* Weinstein & Berger, *supra* note 26, at 10:05 (3), 10-30 (emphasis added).

31. *See supra* note 28.

32. Once again showing its confusion between the attorney-client privilege and work product doctrine, the D.C. Circuit based its "legal" analysis on this point on the lower court's ruling being "counter" to *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). *See* 796 F.3d at 144. Under any scenario, however, *Upjohn* has no factual applicability to the KBR situation (*see supra* note 10 and accompanying text); and, of course, to the extent the ruling was based upon work product, *Upjohn* is legally inapposite.

33. *See* 796 F.3d at 146.

34. *See id.*

35. *See id.* at 148.

36. *See id.*

37. *See United States v. Kovel*, 296 F.2d 917 (2d Cir. 1961). This case allows a narrow exception to the 5 Cs requirement vis-à-vis the attorney-client privilege (*see supra* note 9)—where an attorney uses specific technical support to assist in the representation of a client (e.g., a translator, a financial expert on a highly technical matter, etc.) it does not waive the privilege. *See* A.J. Schoenthal, *"Risk of Waiving Privilege When Hiring Third-Party Consultants," New York Law Journal* (November 9, 2015). That was clearly not the case involving KBR.

38. Della Street, of course, was Perry Mason's confidential secretary. She was (and is) covered by professional ethics Rule 5.3, which concerns the supervision of non-lawyers who are *employed* by lawyers. The Della Street situation is obviously not implicated by the KBR set of facts.

39. *See* 796 F.3d at 150.

40. The D.C. Circuit then went on to justify its second (and improper) granting of the most recent writ of mandamus—*see supra* notes 16-18 and accompanying text—as "law of the case." *See* 796 F.3d at 150.

41. *See* 796 F.3d at 151.

42. *See* J. Rogers, "KBR's Actions in Whistle-Blower Case Didn't Waive Privilege for Internal Probe," *ABA/BNA Lawyers' Manual on Professional Conduct* (August 26, 2015).

43. Hopefully, no one alive today subscribes to the doctrine of Joseph Goebbels: "If you tell a lie big enough and keep repeating it, people will eventually come to believe it."

44. *See supra* note 12.

45. I previously wrote that the initial D.C. Circuit opinion could lead to the reverse of the court's intent—instead of strengthening the attorney-client privilege and work product doctrines, it might well lead corporate clients to ape what KBR did, with judges who understand these issues then rejecting ill-founded privilege and work product claims. *See supra* note 9. The August 11, 2015 double-down decision by the D.C. Circuit only heightens that concern. One of the commentators cited in that second decision, Thomas Spahn, has been quoted as saying he believes other courts will follow the D.C. Circuit's determination on Rule 612 (and that "most lawyers would be astounded" if showing privileged materials to a top corporate executive in preparation for a deposition would cause a Rule 612 problem). *See supra* note 41. As set forth above (*see supra* notes 25-30 and accompanying text), I obviously do not agree with those cheery (but wrong) assessments. Mr. Spahn was also "pleasantly surprised" by the appellate court's "at issue" waiver ruling. As even he noted, however, the privilege cannot be used as a sword and shield (exactly what KBR was trying to do); so presumably, Mr. Spahn knows that KBR dodged a huge bullet.

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