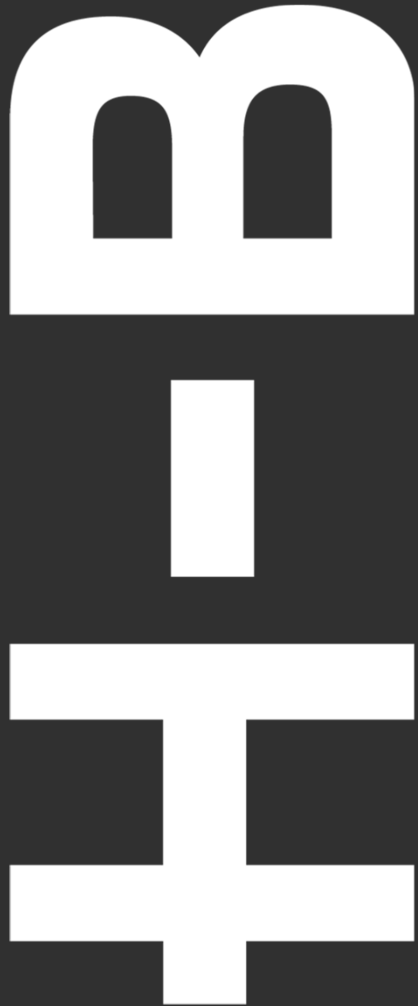

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Tips for Conducting Interviews During Internal Investigations

Brian Flood

Partner

Outline

- Strategies for gathering information: Should you use the carrot or stick?
- Tips for protecting the privilege, including how “overlabelling” can backfire.
- Why some of the classic tips about interviewing may not be the most effective.

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Up John Warnings-Corporate Miranda Warnings

- What is it?
- Are other warnings required by regulation, state or federal law, union requirements or HR policies?
- What is they ask for an attorney?
- What if they refuse?
- What if they use the interview to file a complaint?
- What if the reverse engineer what you are looking at and become a whistle blower….

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The warning

- A Corporate Warning consists of the following statements:
  - Counsel only represents the association and not the employee (witness) personally
  - Counsel is gathering facts for the purpose of providing legal advice to the association
  - The communication is protected by the attorney-client privilege, which belongs to the association and not the employee
  - The association may waive the privilege and disclose the communication to a third-party, including the regulator
  - The employee (witness) must keep the communication confidential and cannot disclose it to any third-party except counsel for that employee (witness)

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See In re Kellogg Brown & Root, Inc., 756 F.3d 754, 757-760 (D.C. Cir. 2014)

- *See In re Kellogg Brown & Root, Inc*., 756 F.3d 754, 757-760 (D.C. Cir. 2014), cert. denied, 135 S.Ct. 1163 (U.S. 2015).

- The U.S. Court of Appeals for the District of Columbia Circuit upheld the privileged status of Kellogg Brown & Root, Inc.'s (KBR's) internal investigation files regardless of whether the investigation was conducted pursuant to a mandatory or voluntary compliance program. …**The court held that the attorney-client privilege applies as long as "a significant purpose" of the investigation is to obtain or provide legal advice**. 756 F.3d at 760.

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KBR Ruling for Internal Investigations

- (1) the Supreme Court's decision in Upjohn v. U.S., 449 U.S. 383 (1981), … **continues to apply to contractor internal investigations conducted for the purpose of complying with Government compliance programs;** and (2) there must be certainty for contractors regarding the applicability of the attorney-client privilege and work product protection to compliance investigations that contractors perform at the Government's behest or direction.
- The Court invoked Upjohn and certainty principles over and over in its decision: In a prior petition for writ of mandamus on this case, we noted that "[m]ore than three decades ago, **the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers**." In re KBR, 2015 WL 4727411, at *1 (emphasis added); …See Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998); Upjohn, 449 U.S. at 393; In re KBR, 756 F.3d at 763.
- Vol. 57, No. 32 August 26, 2015,The Government ConTraCTor® Information and Analysis on Legal Aspects of Procurement, The Government Contractor ®,2 © 2015 Thomson Reuters

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Knowing the Rules

- Under *Kellogg Brown & Root,* a communication is privileged "if **one of the significant purposes of the internal investigation was to obtain or provide legal advice**." 756 F.3d at 760 ("In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance.") (quoting Reporter's Note to 1 Restatement (Third) of the Law Governing Lawyers § 72, p. 554 (2000)). **As long as an investigatory communication satisfies this test, the privilege attaches regardless of whether outside counsel was involved, non-lawyers were used to conduct employee interviews, or the investigation (or compliance program) was required by law or company policy.** 756 F.3d at 757-758.

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Attorney Client Protection

- The attorney-client privilege "exists to protect [both] the giving of professional advice ... [and] the giving of information to the lawyer to enable him to give sound and informed advice." Upjohn Co. v. United States, 449 U.S. 383, 390, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981); see also United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961) (Friendly, J.) (**the attorney-client privilege "must include all other persons who act as the attorney's agents**," including accountants).

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Must PROVE The Privilege Exists

- As Judge Friendly put it, often "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." Id. at 922 (footnote omitted). This circuit, like most, has adopted the Kovel test. See, e.g. United States v. El Paso Co., 682 F.2d 530, 541 [*549] (5th Cir. 1982). **Thus, an attorney claiming the attorney-client privilege for communications between an attorney and an accountant or other professional, or for documents prepared by such professional for an attorney, must prove [**11] that the professional services enabled the giving of legal advice.** United States v. Davis, 636 F.2d 1028, 1043-44 (5th Cir. 1981).

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While Rendering Legal Services

- In cases where a federal question exists, **the federal common law of attorney-client privilege [**20] applies e**ven if complete diversity of citizenship is also present. Caver v. City of Trenton, 192 F.R.D. 154, 159-60 (D.N.J. 2000); Smith v. Smith, 154 F.R.D. 661, 671 (N.D. Tex. 1994). The attorney-client privilege prevents disclosure of **communications between an attorney and client that were made *while seeking or rendering legal services***. See Upjohn Co. v. United States, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981).

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While Giving Legal Advice

- **The privilege applies whether an attorney works at a law firm or works as in-house counsel for a corporation.** *See, e.g., In re Sealed Case,* 237 U.S. App. D.C. 312, 737 F.2d 94, 99 (D.C. Cir. 1984) (concluding that status as an in-house attorney "does not dilute the privilege," ***but stating that the privilege applies only if the attorney gave advice "in a professional legal capacity*****");** *cf. Upjohn Co.,* 449 U.S. at 390

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HOWEVER…

- Though the attorney-client privilege is firmly enshrined in federal law, *Upjohn Co.,* 449 U.S. at 389, "no confidential accountant-client privilege exists under federal law." *Couch v. United States,* 409 U.S. 322, 335, 34 L. Ed. 2d 548, 93 S. Ct. 611 (1973); *see also El Paso Co.,* 682 F.2d at 540; *United States v. Davis,* 636 F.2d 1028, 1043 (5th Cir. Unit A 1981). **Thus, a client's disclosure of documents [**23] directly to an auditor, accountant or tax analyst destroys confidentiality with respect to those documents.** *El Paso Co.,* 682 F.2d at 540; *United States v. Miller,* 660 F.2d 563, 570 (5th Cir. 1981). **If a client seeks only accounting services instead of legal advice, "or if the advice sought is the accountant's rather than the lawyer's, *no privilege exists*."** *United States v. Kovel,* 296 F.2d 918, 922 (2d Cir. 1961) (Friendly, J.).

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Third Party Exception

- **An exception to this rule exists for third parties who assist an attorney in rendering legal advice.** *Id.* at 922. [5] Because the practice of law has increasingly grown more complex, attorneys cannot function effectively without the help of others. *Id.* at 921. **Thus, in *Kovel,* Judge Friendly held that the attorney-client privilege "must include all other persons who act as the attorney's agents." *Id.* at 921 (citations omitted).**
- This logic extends to financial professionals such as accountants. *See id.* at 921-22. Often, "the presence of the accountant is necessary, or at least highly useful; for the effective consultation between the client [**24] and the lawyer which the privilege is designed to permit." *Id.* at 922 (footnote omitted). When an attorney "retains an accountant as a listening post," *id.,* or "directs the client ... to tell his story in the first instance to an accountant engaged by the lawyer ... so that the lawyer may better give legal advice, communications by the client reasonably related to those purposes ought to fall within the privilege." *Id.* [6] **This exception also protects documents [*135] produced as a result of those communications**. *See id.*

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What is the SPECIFIC PURPOSE

- **This exception, however, only applies when communications are made "for the purpose of obtaining legal advice *from the lawyer.*"** *Id.* (emphasis added). If the client seeks only accounting advice, or seeks the accountant's advice instead of the lawyer's, no privilege exists. *Id.* Moreover, a lawyer may not render communications between the attorney's client and the accountant privileged just by placing an accountant on his or her payroll. *Id.* at 921. A mere agency relationship between an attorney and an accountant will not automatically establish protection under the attorney-client privilege. *Id.* Nor will a general claim that an accountant does *some* work for an attorney suffice. *See id.* **Instead, an attorney must prove that he or she hired an accountant for a specific purpose.** *See id.* at 922. That purpose, in turn, must relate significantly to the disputed communications or documents. *See id*

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Was Done To Enable Giving Legal Advice

- This circuit, like most, has adopted the *Kovel* test. *See United States v. El Paso Co.,* 682 F.2d 530, 541 (5th Cir. 1982). [7] **Thus, an attorney claiming the attorney-client privilege for communications between an attorney and an accountant [**26] or for documents prepared by an accountant for an attorney must prove that the accounting services enabled the giving of legal advice.** *Davis,* 636 F.2d at 1043 n.17; *see also United States v. Pipkins,* 528 F.2d 559, 562 (5th Cir. 1976).

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WORK-PRODUCT DOCTRINE

- The federal work-product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3), which states the following:

- Trial Preparation: Materials. Subject to the provisions [**28] of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. **In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories <u>of an attorney or other representative of a party concerning the litigation</u>.**

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Qualified Protection

- The work-product doctrine provides qualified protection of documents and tangible things prepared in anticipation of litigation, including "a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda [**29] of witnesses' statements." *Dunn v. State Farm Fire & Cas. Co.,* 927 F.2d 869, 875 (5th Cir. 1991) (citing *Upjohn Co.,* 449 U.S. at 400; *El Paso Co.,* 682 F.2d at 543).

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The Four Elements for Protection: Step One

- The party who asserts work-product protection must show that the materials warrant work-product protection. *Hodges, Grant & Kaufmann v. United States,* 768 F.2d 719, 721 (5th Cir. 1985). Four elements must be established. **First, the materials must be documents or tangible things.** *See* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2024, at 336 (2d ed. 1994).

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Step Two

- Second, the materials must be prepared in anticipation of litigation or for trial. In other words, (a) the party **had reason** to anticipate litigation and (b) "the primary motivating purpose behind the creation of the document was to **aid *in possible future litigation***." *In re Kaiser Aluminum & Chem. Co.,* 214 F.3d 586, 593 (5th Cir. 2000) (citation and footnote omitted).

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Step Three

- Third, the materials must be **prepared by or for** a party's representative. FED. R. CIV. P. 26(b)(3).

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Step Four

- Fourth, if the party seeks to show that [**30] material is opinion work-product, that party must show that the material contains the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party. *Id.; see In re Int'l Sys. & Controls Corp. Sec. Litig.,* 693 F.2d 1235, 1240 (5th Cir. 1982).

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Waiver

- "The **work-product doctrine is distinct from and broader than the attorney client privilege**." *United States v. Nobles,* 422 U.S. 225, 238 n.11, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975). Unlike the attorney-client privilege, work-product protection is not automatically waived by disclosure to a third party who does not share a common legal interest. *Aiken v. Tex. Farm Bureau Mut. Ins. Co.,* 151 F.R.D. 621, 623 n.2 (E.D. Tex. 1993) (citing *Shields v. Sturm, Ruger & Co.,* 864 F.2d 379, 382 (5th Cir. 1989)). **waiver of work-product protection only** [**32] **if work-product is disclosed to adversaries or treated in a manner that substantially increases the likelihood that an adversary will come into possession of the material.** *See High Tech Communications, Inc. v. Panasonic Co.,* 1995 U.S. Dist. LEXIS 2547, Civ. A. No. 94-1477, 1995 WL 83614, at *8 (E.D. La. Feb. 24, 1995) (citations omitted). **Unlike the attorney-client privilege, the burden of proving waiver of work-product protection falls on the party asserting waiver.** ***Id***

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Significant purpose related to the dispute

- An accountant-client privilege does not exist under federal law. *Couch v. United States,* 409 U.S. 322, 335, 34 L. Ed. 2d 548, 93 S. Ct. 611 (1973). Attorneys may, however, divulge client information to accountants or financial professionals in order to represent their client more effectively. *United States v. El Paso Co.,* 682 F.2d 530, 541 (5th Cir. 1982); *United States v. Kovel,* 296 F.2d 918, 922 [*139] (2d Cir. 1961). **So long as an attorney hires an accountant or financial professional for a specific purpose that relates significantly to the disputed communications or documents at issue, any documents disclosed to such a professional and any communications regarding those documents are privileged.** *El Paso Co.,* 682 F.2d at 541; *Kovel,* 296 F.2d at 922.

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General Hiring VS Specific Hiring Discussion

- **An attorney need not hire an accountant or financial professional solely for a particular lawsuit or discovery dispute to gain protection under the attorney-client privilege.** *See United States v. Pipkins,* 528 F.2d 559, 562 (5th Cir. 1976). Instead, the purpose for which the lawyer hired the accountant or financial professional must relate significantly to the documents and communications at issue in subsequent litigation.

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When then is the Routine and When is the Privileged ?

- If the activity is done in anticipation of litigation and documented well then the privilege and doctrines will generally apply.
- However, if the activity was mandatory to be conducted then the mandatory requirement ***may*** result in the material being discoverable.
- It may require two veins in some jurisdictions: one done in the regular course of business as required by state of federal law and one done in anticipation of litigation. Check your jurisdiction of origin and geographic location(s) of interview.

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40 Tips And Problems: Preparation

- A good reference: https://i-sight.com/resources/40-tips-for-conducting-effective-investigation-interviews/
- *Remove extra distractions, such as computers, files, paperwork, in the interview room.*
- Pick a non-threatening place for the interview, such as a conference room or private office.
- Give the interviewee a choice of times for the interview, being respectful of his or her workload.
- Provide the subject with a rough estimate of the amount of time the interview will take.
- Remove extra distractions, such as computers, files, paperwork, in the interview room.
- Provide the interviewee with a comfortable chair that doesn't face a window.
- Create a comprehensive list of investigation interview questions that you can choose from, depending on the direction the interview takes.
- Decide whether or not to record the investigation interview.
- Put the subject at ease when he or she arrives and offer a glass of water or coffee.

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Questions

- Begin by establishing a baseline by asking simple, easy-to-answer questions that the subject is likely to answer truthfully, such as: How long have you worked at the company?
- Ask open-ended questions to get the subject to talk, such as: Tell me about…
- Avoid loaded questions, such as: Are you a tough supervisor?
- Avoid questions at the beginning that can be answered with a yes or no.
- Do not ask accusatory questions that indicate you think the subject is guilty.
- Ask simple questions that address one fact at a time, rather than combining more than one idea into the same question.
- Do not ask leading questions that prompt for the answer you want, such as: Isn't it true that you punched Jean?
- Ask yes or no questions at the end of the interview to pin down specific facts that were revealed during the interview

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Objectivity

- Explain that you are taking every allegation seriously and are committed to finding the truth.
- Ask the subject to keep the interview confidential only if you have already established grounds for confidentiality.
- Don't promise confidentiality, but tell the subject that you will share information with only those who need to know.
- Avoid being too familiar or taking on the role of "one of the guys".
- Do not share information about what other interview subjects have said (unless you are interviewing the accused or trying to obtain information from a hostile witness).
- Avoid expressing your thoughts, opinions or conclusions about the case or what the interviewee says.
- Do not make agreements or deals with the subject.
- Practice self-awareness by identifying your own potential biases and putting them aside while conducting the interview.

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Development

- If the interview is about a specific event, identify the five Ws: who, what, when, where, why.
- Proceed in chronological order to ensure nothing is missed.
- Ask about witnesses or others who can corroborate or comment on the incident.
- Ask the subject to recreate the dialogue of the incident, in order of what was said.
- Request any notes, documents, phone messages, or other evidence.
- Identify the source of the subject’s knowledge: hearsay, rumor, eye witness, other direct knowledge
- Take detailed notes (or have another person present who is taking detailed notes) that list only what is revealed in the interview, without opinion or comments.
- Note the subject’s body language and physical movements, but without interpretation. For example, write that the subject was tapping his foot rapidly, but not that the subject seemed nervous.

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Summary

- Repeat any questionable or confusing information back to the subject to ensure you heard correctly.
- Get the witness to confirm any areas where you may have misheard or misinterpreted information.
- Ask for clarification and more detail on any vague points.
- Ask follow-up questions to establish more facts in the chain of events, for example: If you were in the cafeteria at 1pm, how did your access card register an entry into the library at the same time?
- If the subject gave evasive answers or avoided a question, rephrase the question and ask it again.
- Ask the subject whether there are any other questions they feel you should have asked or whether there is anything they would like to disclose before you conclude the interview.
- Allow sufficient time for the subject to think before answering any final questions.
- Use silence as a tool to prompt a reaction, when possible

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What kind of report is prepared?

- The form of the report may be oral or in writing, which can be determined based on:
  - The subject matter and subject of the investigation
  - The likelihood of a subsequent request or litigation
  - The need for confidentiality
  - The need to substantiate and document the matter
  - Discoverability considerations
  - Issues of perception
- Disclosing the report
  - Is it required or should it be disclosed?
  - Should it be limited?
  - Are there any considerations to make (*e.g.*, litigation)?
  - What is the likelihood others will inadvertently obtain it?

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Take Aways

- U.S. companies are well-advised to **provide documented and complete Upjohn instructions at the start of any employee interview** dealing with a compliance matter, no matter who conducts the interview (though ideally, interviews would be conducted by outside counsel or by inhouse counsel who perform truly legal rather than business functions).
- It is imperative that Government contractors **draft and implement written mandatory disclosure rule protocols or procedures for initial intake and triage of any allegations of potential misconduct**, assignment of allegations for review, assessment to determine whether disclosure is warranted, documentation of the entire process, and maintenance of documentation for an appropriate period

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- **The protocol should require preparation of documentation at the outset of an investigation establishing that the investigation will be conducted at the express direction of and under the supervision of counsel for the purpose of securing legal advice** and (when appropriate) in anticipation of litigation.
- **The protocol should specify the type of documentation that will be maintained** with respect to any intake matter or investigation, and how and where the documentation will be maintained.

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- **The protocol should state (as appropriate) that documentation generated in the course of an investigation has been created for the purpose of obtaining or providing legal advice, and/or in anticipation of litigation**, and at the express direction of counsel, and is transmitted to counsel if created by non-lawyers.
- In many U.S. jurisdictions fact work product, unlike opinion work product, may be discoverable if the requesting party can demonstrate a substantial need for the materials to prepare its case, and cannot, without undue hardship, obtain their substantial equivalent by other means. **Contractors conducting internal investigations should take appropriate steps to ensure that documents generated in the course of an internal investigation are properly structured to confer opinion work product protection on important documents prepared at the direction of attorneys.**

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- To prevent disclosure pursuant to Fed. R. Evid. 612, a corporate designee may review privileged documents in preparation for a deposition, *but should not rely on their content during testimony in order to protect that content*.
- Although the Circuit Court ultimately found that KBR did not waive its attorney-client privilege by referencing the COBC documents in its motion for summary judgment*, to prevent issue waiver, parties should use caution when referring to privileged documents in the context of an argument or claim.*

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- Investigators and counsel should remember that communications between them *may* not be considered attorney-client privileged in the context of an internal investigation if an investigator "steps into the shoes" of an attorney (rather, such communications may be attorney-to-attorney communications subject to work product analysis).
- **Investigators and counsel should resist the urge to conflate attorney-client privilege and attorney work product, as they are separate and distinct**.
- The KBR Circuit Court's August 11 decision includes a highly instructive discussion of the fundamental choice contractors must make when submitting disclosures to the Government. Either **(1)** they can elect to withhold privileged material in making a disclosure in order to preserve the privileges, as most contractors do, but risk a finding by the Government that the disclosure is not complete or adequate; or (2) they can elect to include privileged material, understanding that waiver has occurred, but expecting Government leniency due to the contractors' significant cooperation
- Reference: Vol. 57, No. 32 August 26, 2015,The GovernmenT ConTraCTor® Information and Analysis on Legal Aspects of Procurement, The Government Contractor ®,2 © 2015 Thomson Reuters for slides 32-36.

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Closing Questions

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