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Privilege Lessons From B&N's Harassment Investigation

By **Tom Jones and David Kelch** (March 6, 2020, 2:50 PM EST)

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Bookseller Barnes & Noble Inc.'s continued legal fight with its ex-CEO has turned into an excellent lesson of some do's and don'ts of conducting an effective internal investigation.

Barnes & Noble launched an internal investigation in 2018 after an executive assistant accused then-CEO Demos Parneros of sexual harassment.

The company fired Parneros, citing violations of company policy. Parneros responded with breach-of-contract and defamation claims, for which Barnes & Noble recently filed their response.[1]

Many in-house corporate counsel will be faced with an internal complaint, or with an external enforcement investigation, that will require the company to conduct an internal investigation. When conducting such an investigation, in-house counsel must take immediate precautions to ensure the application of the attorney-client privilege to investigation communications and to preserve it throughout the investigation and its aftermath.

While it may become advantageous to later waive the privilege in part or whole, if the privilege is not established and preserved at the outset, there will be no decision to be made as the matter progresses.

Privilege and Attorney Work Product in the Corporate Context

While, the attorney-client privilege has long been held[2] to apply in the corporate context, its contours are not clear. Whether the privilege protects an in-house counsel's communications is determined on a case-by-case basis.

To protect the privilege, the corporate client has the burden of showing that the in-house counsel's communication was between an attorney and his client, was made for the purpose of providing legal advice to the corporation, and the communication was intended to be, and was in fact, kept confidential.[3]

In the Barnes & Noble case, a judge for the U.S. District Court for the Southern District of New York ruled

documents from the company's investigations were protected by attorney-client privilege because the handwritten notes and memorandum were prepared by the general counsel or at his direction.

Similarly, attorney work product is ordinarily protected from disclosure. The work product doctrine, originally recognized by the U.S. Supreme Court in 1947 in Hickman v. Taylor,[4] is codified in Federal Rule of Civil Procedure 26(b)(3). To qualify as attorney work product under Rule 26(b)(3) the material must have been prepared "in anticipation of litigation or for trial."

Risks to the Privilege and Work Product Protection in Investigations

Maintaining the attorney-client privilege in an internal investigation led by in-house counsel is not automatic, and can be tricky. Investigations conducted or directed by in-house counsel increase the risk that the company's attorney-client privilege and work product protections will be waived. Leaving aside situations where privileged communications are shared with third parties thereby causing a waiver of the privilege, the difficulty in ensuring privilege protection can be traced to the in-house counsel's dual role.

In-house counsel frequently perform both a business and a legal function for the company. But, only in-house counsel's communications in their legal role can be privileged.

An in-house counsel's communications relating to his or her business function are not privileged simply because the in-house counsel is an attorney.[5] Barnes & Noble was able to convince the judge that their general counsel's investigation was privileged because it was primarily legal despite the fact that it could provide a business benefit.

Maintaining the Privilege and Work Product Protection in Internal Investigations

The judge in the Barnes & Noble case noted in his decision that the investigation was launched the same day the allegations were reported. It's important to act quickly; the more time that passes between the event and the initiation of the investigation, the less likely a court will agree that it was conducted in anticipation of litigation.

In Banneker Ventures LLC v. Graham in 2017,[6] the U.S. District Court for the District of Columbia cited Federal Rule of Civil Procedure 26(b)(3) requiring the production of 51 witness interview memos because they were not protected by the work-product doctrine, as they were not conducted in anticipation of litigation since two years elapsed between receipt of a particular letter to the retention of counsel.

In-house counsel should draft an investigation plan, which explains the investigation's singular focus is to gather facts and, in light of those facts, determine how the company's legal risk and litigation exposure can be mitigated. It should also identify the government enforcement and litigation risks to the company from the underlying events. This will help provide support for a later claim by the company that investigation communications and documents were developed to provide legal advice and in anticipation of litigation.

In-house counsel should control the investigation. The actions of business personnel or business groups in furtherance of the investigation should be done at the direction of in-house counsel with reference to the investigation plan.

In-house counsel should also identify whom the privilege belongs to. If the board has established a special committee for which the investigation is to be conducted, the in-house investigating counsel's client may be the special committee rather than the board or the company.

In Estate of Paterno v. NCAA in 2017,[7] the Superior Court of Pennsylvania found that there was no attorney-client relationship between Penn State University and Freeh Sporkin & Sullivan LLP since it was engaged by the Penn State Board of Trustees to represent Penn State's Special Investigations Task Force.

It is important to form an investigation team that keeps nonlawyers to a minimum or clearly delineates that nonattorney investigators are acting at the direction, and for the benefit, of in-house investigating counsel. In Crabtree v. Experian Information Solutions Inc. in 2017,[8] the U.S. District Court for the Northern District of Illinois held that the corporate attorney-client privilege applies to emails between nonattorney employees so long as a lawyer has "some relationship to the communication" and the email would reveal the "substance of a confidential attorney-client communication." Members of the investigation team should act only on instructions from in-house counsel.

In-house counsel should draft an investigation privilege memo to personnel that will be involved in the investigation. The memo should explain the contours of the privilege and work product doctrine and train team members on how to preserve them.

Investigation-Related Communications and Documents

In-house counsel also must carefully prepare all investigation-related communications and documents. All privileged communications and attorney work product should be labeled as such. In the top line, write "Attorney-Client Privileged Communication," "Confidential" and/or "Attorney Work Product," and set it off with capital letters, bold or different font color. Do not label nonprivileged communications as privileged (i.e., blanket privilege headings do more harm than good).

Communications should be prefaced appropriately. In the first line of the body of an email, write, "I am writing to provide legal advice regarding [X]" or "I am seeking legal advice regarding [Y]." For communications where legal advice is sought, business personnel should put in-house counsel recipient in the "to" versus the "cc" line of the communication. But, note, adding counsel to a communication, on either line, will not automatically make it privileged.

Circulation of legal advice and privileged communications internally should be limited to those that need to know, and do not break confidentiality by circulating it outside the of company.

Avoid mixing business and legal advice. Discuss business matters in separate emails and separate memos. In Smith–Brown v. Ulta Beauty Inc. in 2019,[9] the U.S. District Court for the Northern District of Illinois held that in mixed-advice emails from in-house counsel the privilege may be maintained if obtaining legal advice was "one of the significant purposes of the communication." Where business and legal advice overlap, consider including a preface that the primary purpose of the communication is to provide legal advice.

Written communications should balance effective communication of legal advice with the risk that it could eventually be in the hands of adversaries/court. Counsel may consider sequestering privileged electronic documents in a separate database, or individually password-protecting privileged documents, distributing the password to only those employees with a true need to know the information.

Investigation Interviews

Counsel alone should conduct interviews where possible. If not possible, then make privilege more likely by having counsel direct the interviews, review and summarize the interview notes, and provide an interview outline or topics for questioning. In the case In re: Kellogg Brown & Root Inc. in 2015,[10] the U.S. Court of Appeals for the District of Columbia Circuit stated "agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."

One issue in the Barnes & Noble case was that an Upjohn warning was not given to Parneros by those who conducted his interview. In this case, the judge again ruled in favor of Barnes & Noble, stating "courts have found the attorney-client privilege to shield notes of interviews undertaken as part of an internal investigation without discussing whether an Upjohn warning was first given."[11]

However, it is important in any internal investigation to provide an Upjohn warning at the outset and all interviewees must be informed that the purpose of the interview is to assist the company in obtaining legal advice. Notes for the interview should contain only statements of facts learned in the interview and not attorney analysis or thoughts. Interview notes are likely discoverable because facts are not privileged.

Interview memoranda should memorialize what was learned in the interview but should also contain counsel's interpretations, mental impressions, thoughts and analysis. The beginning of each interview memorandum should include an appropriate work product preface, such as:
This Memorandum of Interview does not contain a verbatim account of the interview questions and responses. The notes of this interview have been edited and reorganized for the sake of clarity. Further, this memorandum reflects the thoughts, opinions, and mental impressions of counsel, and will be used to assist in the investigation and any future related litigation defense efforts. Thus, it is entitled to the highest level of attorney work product protection and attorney-client privilege.

If the interviewee is an aggrieved employee, caution is warranted, especially if the interviewee is represented by counsel. In Smith v. The Technology House Ltd. in 2019,[12] the Ohio Court of Appeals' Eleventh Appellate District found a recording of an interview was not privileged because the employee was sexually harassed, had counsel and was adverse to the company even though they were still an employee.

Internal Investigation Report

The team may consider making an oral internal investigation report[13] (rather than a written one) of the investigation's findings to need-to-know company management. If written, the internal investigation report should be communicated with the recommendations above in mind (i.e., privilege label, legal advice preface), and should be distributed only to those in the company who need to know.

Any public release of only findings of fact from the investigation should be done after careful review of applicable case law. Ostensibly, a release of findings of fact is not a release of attorney-client communications. But, at least one court has found that even findings of fact waived the privilege since it "fully reflected the themes, core findings, and failings identified in the investigation."[14]

Conclusion

The specter of litigation hangs over nearly every internal investigation, whether it is routine or

exceptional. Barnes & Noble followed most guidelines and were able to protect their privileged communications and work product in their legal fight.

Companies should take note that taking prudent steps in structuring, directing, conducting and reporting an internal investigation can maximize the potential that the investigation remains confidential, even after later challenge. Some extra effort at the outset by corporate counsel can preserve the attorney-client privilege and attorney work product at all stages of an investigation matter.

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[1] Demos Parneros v. Barnes & Noble, Inc., No. 1:2018cv07834 (S.D.N.Y. 2019).

[2] Upjohn Co. v. United States, 449 U.S. 383 (1981).

[3] In re the County of Erie

[4] Hickman v. Taylor, 329 U.S. 495 (1947).

[5] In re the County of Erie

[6] Banneker Ventures, LLC v. Graham, No. 1:2013cv00391 (D.D.C. 2017).

[7] Estate of Paterno v. NCAA, (Pa. Super. July 25, 2017).

[8] Crabtree v. Experian Information Solutions, Inc., No. 1:2016cv10706 (N.D. Ill. 2017).

[9] Smith-Brown v. Ulta Beauty Inc. (N.D. Ill.).

[10] In re Kellogg Brown & Root., Inc., (D.C. Circ. 2014).

[11] Parneros v. Barnes & Noble, Inc.

[12] Smith v. Tech. House, Ltd., CASE NO. 2018-P-0080 (2019).

[13] Making an investigative report to the government regarding the investigation's findings may result in a waiver of the privilege and work product protection. How to protect these privileges in these circumstances is outside the scope of this article, but caution should be exercised and an opinion from outside investigation counsel may be warranted.

[14] Doe v. Baylor University.