Section of Environment, Energy, and Resources
American Bar Association

Environment, Energy, and Resources Law: The Year in Review 2019

Chapter AA · In-House Counsel

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Chapter AA: IN-HOUSE COUNSEL
2019 Annual Report[1]

I. WAIVING PRIVILEGE FOLLOWING AN INTERNAL INVESTIGATION: A CASE STUDY

Following an incident or allegation of wrongdoing in the workplace, organizations often choose to perform an internal investigation at the direction of or with the assistance of legal counsel. Depending on various factors, such as whether the investigation is performed to aid counsel in rendering legal advice, communications and materials relating to the investigation can be protected from disclosure by applicable legal privileges, such as the attorney-client privilege and attorney work product privilege.[2] After the conclusion of an internal investigation conducted under privilege, organizations and their legal counsel are often faced with a dilemma regarding what, if anything, to disclose from the investigation. Depending on the nature of the event that led to the investigation, various parties may be seeking an explanation of what happened and why it happened, including business partners, government agencies, media, and insurers.[3] While providing factual information gained during a privileged investigation can provide benefits to the company, including promoting its relationship with the public and business partners, recent case law suggests that disclosing too much information, even if factual, can result in waiver of privilege for some or all of the communications and materials relating to the investigation (i.e., subject matter waiver).

In *Doe v. Baylor University*,[4] Baylor University hired a law firm "to conduct an independent and external review of Baylor University's institutional responses to Title IX and related compliance issues through the lens of specific cases."[5] Following the law firm's investigation, Baylor released two documents to the public relating to the investigation: a 13-page "Findings of Fact" and a 10-page list of recommendations titled, "Report of External and Independent Review, Recommendations."[6] In a subsequent civil suit, plaintiffs sought "production of materials provided to and produced by [the law firm] in connection with the investigation."[7] Baylor objected to the production, claiming the materials were protected by the attorney-client privilege and the work-product privilege. Plaintiffs argued, among other things, Baylor waived the privilege when (1) Baylor disclosed the Findings of Fact and Report of External and Independent Review, Recommendations; (2) Baylor disclosed information from the investigation in a court pleading; and (3) the law firm briefed former Baylor regents on details of the investigation.[8]

Focusing largely on the two reports disclosed to the public, the court found Baylor waived the attorney-client privilege with respect to the investigation.[9] The court held that

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[1]Part I of this report was authored by Robert Ayers, Holland & Hard, Jackson, Wyoming; and Vic Pyle, ExxonMobil Corporation, Spring, Texas. Part II of this report was authored by Heather Kress, Sasol, Houston, Texas. Evynn Overton, Beveridge & Diamond, Baltimore, Maryland assisted in compiling this report.

[2]*See* Upjohn Co. v. United States, 449 U.S. 383, 397, 401 (1981); FED. R. CIV. P. 26(b)(3).

[3]This article focuses on investigations performed pursuant to legal privilege; it does not apply to investigations and related disclosures that are required by law, such as an incident investigation report required by the OSHA Process Safety Management Standard. 29 C.F.R. 1910.119(m).

[4]320 F.R.D. 430 (W.D. Tex. 2017).

[5]*Id.* at 434 (internal quotations omitted).

[6]*Id.*

[7]*Id.*

[8]*Id.* at 437.

[9]*Id.*

Baylor's "disclosures were intentional and together provide substantial detail about both what Baylor and its employees told [the law firm] and what advice Baylor received in return."[10] Baylor argued it did not waive privilege because the disclosures only revealed underlying facts, not confidential communications.[11] The court rejected this argument, finding that the breadth and detail of information in the 13-page Findings of Fact revealed what facts Baylor provided to its outside counsel and was, therefore, a "publication of evidence of the communications."[12] Further, due to "the level of detail publicly released about the investigation as a whole," the court found "the waiver encompasses the entire scope of the investigation, and all materials, communications, and information provided to [the law firm] as part of the investigation."[13] As to the work-product privilege, the court found Baylor waived the privilege for the documents it had disclosed and ordered Baylor to produce an itemized privilege log for the remaining documents Baylor claimed were protected by the work-product privilege.

Less than one year later, the Eastern District of Tennessee applied *Doe v. Baylor University* in finding that public disclosure of a report following an investigation waived privilege for the entire investigation.[14] In *Hamilton*, a school "board hired attorney Courtney Bullard to conduct an investigation" relating to alleged sexual assault "and to provide legal advice in anticipation of litigation."[15] Following the investigation, Bullard created a 27-page report, the "Bullard Report," that examined various issues relating to the alleged assault.[16] The school board, "presumably in response to public interest in the underlying events," subsequently voted to release the Bullard Report to the public.[17] In a later-filed civil suit, the school board agreed to produce copies of witness statements and other materials gathered by attorney Bullard during the investigation, but it refused to produce communications between Bullard and another attorney for the school board, Scott Bennett.[18] In determining whether the communications were protected by the attorney-client privilege, the court found that "[e]ven if the attorney-client privilege were deemed applicable," the school board waived the privilege when it released the Bullard Report.[19] The court relied on *Doe v. Baylor University* for the proposition that releasing a detailed summary of the investigation waives the attorney-client privilege for the entire scope of the investigation.[20]

While these two cases raise concern for organizations and attorneys who perform internal investigations under privilege, especially as it relates to releasing facts following a privileged investigation, they do not establish a blanket rule that releasing any information following an investigation results in waiver. The absence of such a rule was supported in a recent opinion by the Southern District of New York. In *Parneros v. Barnes*

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[10] *Doe*, 320 F.R.D. at 437.
[11] *Id.* at 438.
[12] *Id.* (internal quotations omitted).
[13] *Id.* at 440.
[14] Doe v. Hamilton Cty. Bd. of Educ., No. 1:16-CV-497, 2018 WL 542971, at *1 (E.D. Tenn. Jan. 12, 2018).
[15] *Id.* at *1.
[16] *Id.*
[17] *Id.*
[18] *Id.* at *2.
[19] *Doe*, 2018 WL 542971, at *3.
[20] *Id.* ("[s]imilarly, I find that when the Board released the Bullard Report, it waived the attorney-client privilege as to the entire scope of the investigation performed by Attorney Bullard, and all materials, communications, and information provided to Attorney Bullard as part of her investigation.").

& Noble, Inc.,[21] Barnes and Noble hired a law firm to investigate allegations of misconduct against its Chief Executive Officer, Demos Parneros.[22] Following the law firm's investigation, it issued a report to Barnes & Noble's Board of Directors, which was "prepared to provide the Board of Directors with legal advice regarding Parneros's possible termination."[23] The Board subsequently terminated Parneros, and Parneros filed suit alleging wrongful termination, among other things.[24] During discovery, Barnes & Noble refused to produce the report prepared for the Board of Directors based on privilege. Parneros argued that any privilege that may have applied was waived when Barnes & Noble issued a press release regarding the advice it received from its outside counsel.[25] Specifically, the press release stated that "Parneros was terminated for 'violations of the Company's policies' and that '[t]his action was taken by the Company's Board of Directors who were advised by the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP.'"[26] The court disagreed, stating there was no waiver because the "press release does not disclose the substance of counsel's advice, but rather only discloses the fact of counsel's consultation."[27]

Taken together, these and similar cases appear to present a common takeaway: disclosing significant detail from an investigation, even if factual, can result in waiver, but making a non-specific, limited disclosure likely does not waive privilege.[28] There is, of course, no apparent bright line, and legal standards vary by jurisdiction. Regardless, organizations and counsel should take note that the oft-cited "facts are not privileged" reasoning should not be taken as an absolute. If the facts are so exhaustive or detailed as to essentially disclose the underlying communications with counsel, courts may find their disclosure constitutes waiver. As a result, parties should be particularly careful when determining what, if any, information should be disclosed following an investigation and should weigh the benefit of the disclosure against the cost of potentially waiving privilege.

II. STAYING THE COURSE OF SUSTAINABILITY

Often, I am asked by people both internally and externally if my work has become easier because of the current administration's push for deregulation and rollback of some environmental protections, and my answer is always no. On the contrary, it makes things more difficult. When a government steps back from regulating, something is always there to take its place. Currently, investors, communities and non-governmental organizations have taken up the mantle of requesting more detail, more transparency and more disclosure related to sustainability issues.[29] From an internal perspective, how does a company handle the recent focus on sustainability and the requests for more information from a broad spectrum of parties? In two words: carefully and consistently.

Why should a legal department be involved in sustainability? The answer is that sustainability disclosures are a mix of technical data and aspirational and cultural

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[21] No. 1:18-CV-07834-JGK-GWG, 2019 WL 4891213 (S.D.N.Y. Oct. 4, 2019).
[22] *Id.* at *1-2.
[23] *Id.* at *3.
[24] *Id.*
[25] *Id.* at *23.
[26] *Id.*
[27] *Paneros*, 2019 WL 4891213, at *27 (internal quotations omitted).
[28] *See, e.g.*, Donna Fisher & Matthew Hamilton, *Protecting the Privacy of Privileged Internal Investigations*, JD SUPRA (Nov. 21, 2017).
[29] *See, e.g.*, Billy Nauman, *Amazon Accused of Lack of Transparency on Climate Impact*, FIN. TIMES (June 16, 2019).

statements.[30] More accurately, they are opportunities for misstatements and litigation. Recent litigation regarding sustainability disclosures has focused on what the company is saying publicly and whether those disclosures are consistent with their actions.

In *York County v. Rambo*,[31] the plaintiffs' allegations arise from an investigation that included a review of the defendant's publicly available information, including SEC filings, press releases, media reports and other publicly disclosed reports. The complaint alleges that the defendant made misleading statements in bond offerings related to numerous issues, including preparedness regarding the risks of extreme weather, climate change, wildfires and other sustainability focus areas. Plaintiffs claim the defendant misled investors by stating in publicly available reports and investor presentations that that defendant had mitigation strategies in place (including vegetation and equipment maintenance programs) to combat climate change, wildfires and other risks. The complaint includes excerpts from the defendant's reports and also quotes from company executives discussing their commitment to safety, the company's investment in a more modern and resilient system to address problems associated with climate change and the strength of their vegetation management program. The complaint effectively uses the defendant's own reports to highlight inaction.[32] Simply put, anything you say can and will be used against you in a court of law.

The York County complaint illustrates why it is important for a legal department to be involved in any reporting related to sustainability.[33] Typically, sustainability disclosures are drafted by environmental staff (sometimes with input from corporate affairs or investor relations) and may or may not be reviewed by counsel. Often, corporate counsel may not have been involved in the review because initially, sustainability reports were focused on disclosing environmental data (such as emissions or water usage) that had already been reviewed, certified and even submitted to various government agencies. Mostly, reporting only consisted of data without broader statements related to reduction goals or strategies. However, now that the 2020s have been named "The Climate Decade," there is more of a focus on whether companies are properly assessing and mitigating the risks, rather than simply providing data.[34]

In the court of public opinion, it is no longer enough to simply measure and publish reports without taking responsible action. Over the past several years, it has become the norm for a company to publish sustainability data along with strategies, reduction goals and processes to combat their operations' impact on climate change.[35] As the public's awareness of the impacts of climate change increases, and as the current administration continues to deregulate and rollback environmental regulations, an increasing number of individuals and organizations are requesting that corporations provide more information related to sustainability. Many companies also operate across diverse geographic regions in both the developed and developing world, which adds different languages, cultures and priorities to the chorus of disclosure requests. Once the sustainability goals and strategies are published, these firms are often expected to meet (and in some cases exceed) targets, or run the risk of litigation from investors and pressure from internal and external actors.

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[30] *See, e.g.*, David R. Woodcock et al., *Managing Legal Risks from ESG Disclosures*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Aug. 12, 2019).

[31] Compl. for Violations of the Securities Act of 1933, York Cty. v. Rambo, No. 3-19-CV-00994-RS, 3, 13, 15 (N.D. Cal. Feb. 22, 2019).

[32] *Id.* at 15-19.

[33] *Id.* at 11.

[34] *Id.*

[35] John Lukomnik, *State of Integrated and Sustainability Reporting 2018*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Dec. 3, 2018).

From an internal perspective, recent litigation and increasing demand for more information related to sustainability are reasons to pause and review internal processes for the public release of information.[36] Before an organization can begin to answer the external voices, it must create a broad and consistent internal message and a global chorus to give voice to the message. Once that message is set, any disclosure of information related to sustainability data and targets should be reviewed by a variety of stakeholders, including legal, environmental, corporate affairs, investor relations and management, to ensure that what is being disclosed is consistent with any internal messages regarding sustainability.[37] If they are not consistent, make them so, and take care that the goals and strategies that are disclosed are attainable and measurable. Investors and the public will hold you to anything that appears in any form (reports, filings, speeches, investor calls, etc). Be thoughtful in the drafting of your sustainability reporting and strategy, and truly understand what is attainable for your firm. Be transparent about what is attainable, even if it's not what investors, communities, or NGOs want to hear. Many companies rush to jump on the sustainability bandwagon without understanding the consequences of their disclosures and actions. Being careful and consistent might not always prevent litigation, but it will certainly provide a foundation from which to defend.

[36]Andrew J. Hoffman, *The Next Phase of Business Sustainability*, STANFORD SOC. INNOVATION REV. (Spring 2018).

[37]Alana L. Griffin, Michael J. Biles & Tyler J. Highful, *Institutional Investors Petition the SEC to Require ESG Disclosures*, BUS. L. TODAY (Jan. 16, 2019).