



## District court limits application of privilege in internal investigations

### Litigation Alert

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The Southern District of New York offered a strong rebuke to defendant Bank of China (BOC) in a discovery dispute, finding that documents created as part of an internal investigation into potential terrorist activities of a BOC customer were not protected by either the attorney-client privilege or the work product doctrine.

**Great resource: @DLA\_Piper's global guide to legal profession privilege: how it applies around the world**  
<http://t.co/z9FvtDhWa1>

— **Legal Week (@LegalWeek) March 23, 2015**

In *Sheryl Wultz et al. v. Bank of China Ltd.* 1:11-cv-1266 (S.D.N.Y. Jan. 21, 2015) Magistrate Judge Gabriel Gorenstein ruled that the documents were not privileged merely because no US attorney helped create them, even though they were created through BOC's routine anti-money laundering (AML) processes "with the expectation" that they would be turned over to counsel.

Furthermore, the court rejected application of the work product doctrine because the documents were not created for the specific purpose of litigation. The court held that work product protection does not apply to internal investigations that would have been performed regardless of litigation, even if a lawsuit ultimately results from the facts at issue.

The opinion serves as a warning to corporate clients to:

- have protocols in place to facilitate escalation of issues to the legal function so that privilege considerations are taken into account prior to an investigation
- involve US in-house counsel in internal investigations that may have consequences in the United States and
- implement internal procedures that provide for referral to outside counsel when appropriate, especially when US litigation is imminent or to protect privilege in jurisdictions that do not recognize in-house counsel as a source of legal privilege.

#### Claims of terrorist financing

In January 2008, BOC's New York Branch (BOC-NY) received a demand letter from an attorney threatening to file a suit alleging that BOC "'knowingly and intentionally' provided material assistance to terrorist groups that facilitated and caused terrorist attacks." The attorney claimed that BOC customer Said al-Shurafa was a senior member of a terrorist group responsible for a 2006 suicide bombing in Tel Aviv, Israel, and that BOC had assisted Shurafa by executing wire transfers on his behalf totaling several million dollars.

In response to the letter, BOC's Head Office began an internal investigation conducted predominantly by employees in China under the banks' standard AML policies. No US-based attorneys were involved in that investigation, and the AML policy did not provide for referral of the investigation to the US legal department. In August 2008, plaintiffs filed a complaint in federal district court and, in the course of discovery, sought documents created during the AML investigation. Despite the absence of attorney involvement, BOC claimed that the attorney-client privilege and the work product doctrine protected those documents.

#### Lack of attorney involvement precludes application of attorney-client privilege

BOC argued that the attorney-client privilege applied because the documents sought by plaintiffs related to the investigation of the demand letter. According to BOC, it conducted the AML investigation "with the expectation" that US counsel would ultimately use the documents to provide legal advice.

The court, however, found that the privilege does not attach merely because a party planned to turn investigation documents over to an attorney. BOC had not involved a US lawyer in its internal investigation. That fact alone precluded the privilege from applying, the court found.

#### Work product doctrine requires a specific litigation purpose

Although attorney involvement is not a prerequisite for work product protection, the court found that doctrine inapplicable because BOC could not show that the threat of litigation affected its investigation in any way. For work product protection to apply, the party asserting the protection must show that it would have conducted the investigation differently had no possibility of litigation existed. When, as here, the corporation's AML processes would have produced documents "in essentially the same form irrespective of litigation," work product protection does not apply because the documents were not created specifically for the lawsuit.

The court noted that BOC would have created essentially the same documents if it "had been presented with the identical facts about Shurafa in circumstances in which it did not foresee litigation." Noting that the burden falls on the party asserting the work product protection, the court observed that the bank's regulatory obligations likely would have required the same investigation regardless of the threat of suit. The court therefore found no basis for withholding the internal investigation documents, and order BOC to produce them.

#### The importance of defining internal processes and engaging in-house and external counsel

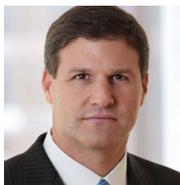
*Wultz* illustrates the importance of implementing policies and procedures that provide for escalation of issues to the legal department to ensure that privilege is considered before an investigation begins. The key takeaway for foreign companies that anticipate US litigation is that the involvement of in-house counsel in investigations is

critical. Retaining external counsel may be necessary when litigation becomes foreseeable or is necessary to protect privilege when the applicable jurisdiction does not recognize one for communications with in-house attorneys.

Find out more about the implications of this decision by contacting the authors.

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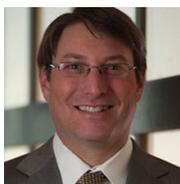
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