

white collar lawflash

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D.C. Circuit Protects Attorney-Client Privilege in Internal Corporate Investigations

The appellate court clarifies that internal corporate investigations are subject to the attorney-client privilege where one of the significant purposes of the investigation is to secure legal advice for the company.

On June 27, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit held that the attorney-client privilege attaches to internal corporate investigations where one of the significant purposes of the investigation is obtaining legal advice for the company.¹ In granting a petition for a writ of mandamus filed by Kellogg Brown & Root, Inc. (KBR), which challenged a lower court ruling compelling production of investigation records in a qui tam action, the D.C. Circuit made clear that reports of voluntary internal investigations do not lose privilege protection just because the investigation was undertaken pursuant to regulatory or corporate obligations. Rather, if a significant purpose of the investigation was to inform legal advice for the company, reports of the investigation should remain protected from disclosure.

Background—Lower Court Applies “But For” Standard

In March 2014, Judge James Gwin, sitting by designation on the U.S. District Court for the District of Columbia,² ordered that KBR produce several reports, dating from 2004, of internal investigations performed pursuant to KBR’s code of business conduct to relator Harry Barko in connection to his False Claims Act qui tam action pending against the company. Barko argued that the reports, which relate to alleged improper conduct by KBR employees, were relevant to his claims that KBR had defrauded the U.S. government under a series of defense contracts. Barko further argued that the reports were not protected by the attorney-client privilege, even though the underlying investigations had been undertaken at the direction of the KBR Law Department. The district court agreed.

The court applied what it called a “primary purpose” test, but held that, for the attorney-client privilege to protect the KBR investigation reports from disclosure, the investigations themselves would not have occurred “but for” the fact that legal advice was being sought.³ Unlike the investigation at issue in the seminal corporate attorney-client privilege case, *Upjohn Co. v. United States*,⁴ the court concluded that the KBR investigations were “routine” corporate compliance investigations undertaken pursuant to regulatory requirements of defense contractors that mandate corporate compliance programs. The district court reasoned that, because the KBR investigations satisfied KBR’s regulatory requirements, they would have occurred regardless of whether legal advice was being sought. The court held the investigations did not satisfy its “but for” standard and KBR’s investigation reports were, therefore, not privileged.⁵

1. See *In re Kellogg Brown & Root, Inc.*, No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014) (slip op.).

2. Judge Gwin normally sits on the U.S. District Court for the Northern District of Ohio.

3. See *United States ex rel. Harry Barko v. Halliburton Co.*, No. 1:05-CV-1276, 2014 WL 1016784, at *2 (D.D.C. March 6, 2014) (citing *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012)).

4. 449 U.S. 383 (1981).

5. *United States ex rel. Barko*, 2014 WL 1016784, at *3 (internal citations omitted) (“The [KBR] investigation was a routine corporate, and apparently ongoing, compliance investigation required by regulatory law and corporate policy. In contrast, the Upjohn internal investigation

KBR initially sought to certify the issue for interlocutory appeal but was denied by the lower court. It then filed a petition for a writ of mandamus to the D.C. Circuit, challenging the district court's order.

Attorney-Client Privilege in Internal Investigations—Legal Advice Need Only Be a Primary Purpose, Not *the* Primary Purpose

The D.C. Circuit agreed with KBR and issued the writ, holding that the district court's ruling constituted clear legal error. In analyzing the underlying privilege claim, the circuit court rejected the lower court's attempt to distinguish KBR's investigations from the investigation conducted in *Upjohn*, concluding that the two sets of investigations were materially indistinguishable in that both were initiated to gather facts and ensure compliance with the law. Moreover, both were conducted under the auspices of the in-house legal department. The circuit court then explicitly rejected the "but for" standard applied by the lower court and clarified the proper standard that should govern the application of privilege in the internal investigation context. The panel explained that, under this standard, "[s]o long as obtaining or providing legal advice was *one of the significant purposes* of the internal investigation, the attorney-client privilege applies."⁶ The privilege applies to internal investigations under this standard, "even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion."⁷

Perhaps most significantly, the circuit court recognized the potential damage the district court's ruling could have wrought to the attorney-client privilege—and to corporations seeking to comply with the law through proactive internal investigations—if it had been allowed to stand. Under the lower court's "but for" formulation, "businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'"⁸ Instead, the D.C. Circuit recognized that simply because internal investigations can, and often do, serve both business and legal purposes, the dual purpose does not vitiate the privilege.

Conducting Investigations and Maintaining Privilege

Although the D.C. Circuit clarified that the attorney-client privilege attaches to internal investigations "if one of the significant purposes of the internal investigation was to obtain or provide legal advice,"⁹ clients seeking to ensure that internal investigations retain privilege protections are well advised to take the following steps to remove any doubt as to whether the investigation is privileged:

- The investigation should be done at the direction and under the supervision of legal counsel. While at the very least, in-house counsel serving in a legal capacity should oversee the investigation, as a best practice, outside counsel should be involved early in the investigative process.
- Investigators leading employee interviews, even if not legal counsel, should provide *Upjohn* warnings at the beginning of the interview that clearly state that the investigation is being conducted under the supervision of legal counsel for the purpose of providing legal advice to the company.
- To the extent possible, all investigatory processes, memoranda, and reports should be prepared by legal counsel acting on behalf of the company and should be clearly marked as subject to the attorney-client privilege and work-product protection.
- If the investigation uncovers information that may subject the company to civil or criminal liability, outside counsel should be consulted immediately.

was conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation. As such, the [KBR] investigative materials do not meet the 'but for' test because the investigations would have been conducted regardless of whether legal advice was sought. The [KBR] investigations resulted from the [d]efendants' need to comply with government regulations.").

6. *In re Kellogg Brown & Root*, 2014 WL 2895939, at *4 (emphasis added).

7. *Id.*

8. *Id.* (quoting *Upjohn*, 449 U.S. at 392).

9. *Id.* at *5.

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