

# Client Alert

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## Upjohn Upheld: D.C. Circuit Re-Affirms Privilege Protections for Multi-Purpose Internal Investigations

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In one of the most important decisions of the year for corporate legal departments, on June 27, the D.C. Circuit held that a company's internal investigation documents were protected by the attorney-client privilege where "one of the significant purposes" of the investigation was "to obtain or provide legal advice."<sup>1</sup> The issue was before the D.C. Circuit on Kellogg Brown & Root's ("KBR") petition for a writ of mandamus seeking review of a surprising decision in which the District Court had ordered KBR to produce final reports documenting its prior internal investigations. While corporate legal departments breathe a collective sigh of relief, this case underscores the need to structure internal investigations thoughtfully in order to maximize attorney-client privilege protection.

### FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Harry Barko, who worked for KBR, filed a whistleblower complaint under seal pursuant to the *qui tam* provisions of the False Claims Act. The complaint alleged that KBR, a former subsidiary of Halliburton, defrauded the federal government by inflating costs and accepting kickbacks while performing reconstruction contracts in Iraq. The complaint remained under seal until 2009.

In the meantime, KBR's in-house attorneys and compliance team received a tip from an employee regarding alleged violations of the company's Code of Business Conduct arising from the company's wartime government contracts, including the contract at issue in Barko's *qui tam* complaint. Several internal investigations were conducted at the direction of KBR's legal department.

After Barko's *qui tam* complaint was unsealed and discovery in the case commenced, Barko sought production of the reports that summarized the findings of KBR's internal investigations. In response, KBR asserted that the reports were protected by the attorney-client privilege and attorney work product doctrine because the investigations had been conducted for the purpose of obtaining legal advice and in anticipation of litigation. Barko then filed a motion to compel production of the reports. Notably, Barko did not argue that KBR waived the attorney-client privilege or work product doctrine. Rather, the sole basis for Barko's motion to compel was that the privilege and doctrine never attached to the reports in the first instance.

### DISTRICT COURT GRANTS BARKO'S MOTION TO COMPEL

In separate suits pending before other courts, KBR succeeded in establishing that the reports were protected from discovery under the attorney-client privilege and work product doctrine. It thus came as a surprise when the District Court, after reviewing the reports in camera, determined that the privilege and doctrine did not apply.

<sup>1</sup> *In re Kellogg Brown & Root, Inc.*, No. 14-5055, slip op. at 10 (D.C. Cir. June 27, 2014).

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The District Court found that KBR's internal investigations were "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice" or in anticipation of litigation. The District Court explained that KBR's Code of Business Conduct merely implemented Department of Defense regulations that require all of its government contractors to investigate certain "improper conduct." As a consequence, the District Court concluded that KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought," and would have been made even if legal advice had not been sought.<sup>2</sup>

Likewise, the District Court found that the attorney work product doctrine did not apply to the reports because the investigation was conducted during the ordinary course of business, as required by regulatory law and the company's Code of Business Conduct, and not in anticipation of litigation. The District Court also noted that the investigations were conducted by KBR several years before Barko's *qui tam* complaint was unsealed. This fact, according to the District Court, "further support[ed] the conclusion that the investigation was not conducted 'in anticipation of litigation.'"

In so holding, the District Court distinguished KBR's investigation from the privileged investigation at issue in the Supreme Court's seminal decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). There, the Supreme Court held that the attorney-client privilege applies to corporations, including documents created during an internal investigation, where the investigation was conducted by the company's General Counsel after conferring with outside counsel, and the witness interviews were conducted by attorneys.<sup>3</sup> In contrast to that investigation, the District Court pointed out that outside counsel played no role whatsoever in KBR's investigation, many of the interviews were conducted by non-attorneys, and the interviewees were never informed that a purpose of the interviews was to assist KBR in obtaining legal advice.

The District Court's decision had immediate ripple effects throughout the legal and compliance communities, as it caused companies to question whether having strong compliance policies that require allegations to be investigated somehow put the attorney-client privilege protection at risk, and whether being good corporate citizens by investigating and remediating allegations of fraud would leave them vulnerable to public disclosure of their efforts.

## D.C. CIRCUIT VACATES THE DISTRICT COURT'S DISCOVERY ORDER

KBR filed a petition for a writ of mandamus—a "drastic and extraordinary" remedy "reserved for really extraordinary causes"—with the D.C. Circuit. The Chamber of Commerce, its constituents, and various trade associations filed an amicus brief in support of KBR, emphasizing the broad implications of the District Court's decision. An engaged three-judge panel—comprised of Judges Griffith, Kavanaugh and Srinivasan—heard oral argument on May 7, 2014.

The D.C. Circuit rendered its much-anticipated decision on June 27, 2014. In an opinion authored by Judge Kavanaugh, the panel unanimously found that the District Court's ruling was legally erroneous and that the error

<sup>2</sup> *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at \*2 (D.D.C. Mar. 6, 2014) (quoting *United States v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012)).

<sup>3</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 386-87, 394-95 (1981).

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justified granting the extraordinary relief of mandamus. The D.C. Circuit thus vacated the District Court's document production order.

## **D.C. Circuit Rejects the District Court's "But-For" Approach to the "Primary Purpose" Test for Determining the Applicability of Attorney-Client Privilege.**

To determine if a communication is subject to the attorney-client privilege, courts typically assess whether a "primary purpose" of the communication was to obtain or provide legal advice. In the *KBR* case, the District Court found that the "primary" purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. The D.C. Circuit rejected the District Court's "but-for" approach because it is "inherently impossible" and "not correct" for "a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes." The primary purpose test "cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other."

Embracing the standard articulated in 1 Restatement (Third) of the Law Governing Lawyers § 72, Reporter's Note, at 554 (2000), the D.C. Circuit explained that the correct test is whether "obtaining or providing legal advice [was] a primary purpose of the communication, meaning one of the significant purposes of the communication." Therefore, the privilege applies so long as "one of the significant purposes of the internal investigation was to obtain or provide legal advice." Importantly, the privilege applies regardless of whether the investigation was conducted pursuant to a statutory or regulatory requirement, or a company policy, because obtaining or providing legal advice need not be the "sole" purpose of the investigation. Rather, it need only be a "significant" purpose of the investigation.

## **D.C. Circuit Finds that KBR's Investigation Was "Materially Indistinguishable" from the Privileged Investigation at Issue in *Upjohn*.**

In vacating the District Court's discovery order, the D.C. Circuit found that, as in *Upjohn*, KBR initiated the internal investigation to gather facts and ensure compliance with the law after being informed of alleged misconduct. In addition, the D.C. Circuit noted that KBR's investigation was conducted under the auspices of KBR's in-house legal department acting in its legal capacity. These facts alone, from the D.C. Circuit's perspective, brought KBR's investigation within the ambit of the Supreme Court's ruling in *Upjohn*.

The D.C. Circuit expressly rejected the three distinctions identified by the District Court as insufficient to take the case "out from under *Upjohn*'s umbrella." First, the D.C. Circuit explained that "*Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply." Second, even though many of the interviews were conducted by non-attorneys, the investigation was conducted "at the direction" of the attorneys in KBR's Law Department. Third, the D.C. Circuit explained that *Upjohn* does not require a company to use "magic words" in order to gain the benefit of the privilege for its internal investigation. As in *Upjohn*, KBR's employees "knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected."

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## D.C. Circuit Finds Mandamus Relief Is Warranted

Perhaps the most interesting aspect of the D.C. Circuit's decision is in the Court's acknowledgement of the significance of this decision for the business community at large. Specifically, the D.C. Circuit observed that "the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry." In addition to investigations conducted by government contractors, the D.C. Circuit's opinion refers to investigations conducted by public companies pursuant to the SEC's internal control requirements as another broad category of investigations that would lose privilege protections under the erroneous "logic" of the District Court's ruling. Indeed, the D.C. Circuit concluded that "the District Court's decision would disable *most public companies* from undertaking confidential internal investigations."

The D.C. Circuit also correctly recognized that, were it to uphold the District Court's decision, "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.'" Finally, the D.C. Circuit agreed with the amicus brief, which underscored the level of concern in the business community about the District Court's decision and the fact that the District Court's approach could "work a sea change in the well-settled rules governing internal corporate investigations."

For these compelling reasons, the D.C. Circuit granted KBR the extraordinary relief of mandamus. In so doing, the Court did not separately address KBR's assertion of the attorney work product doctrine.

### KEY TAKEAWAYS

The D.C. Circuit's decision resolves the uncertainty created by the District Court's decision. That said, the D.C. Circuit's decision reminds us of the importance of conducting internal investigations in a way to ensure the privilege applies. For example, even where non-attorneys conduct interviews in an investigation, it is advisable to document and convey to interviewees that the interviews are being conducted at the express direction of legal counsel—whether internal or external. Likewise, to maximize privilege protection, attorneys should direct the overall investigation by making the critical decisions concerning the subject matter to be investigated and the scope of the investigation. Attorneys should also direct the investigation process, including decisions regarding the documents to be reviewed, the witnesses to be interviewed, and the specific issues to be decided. Any written record of the investigation should also leave no doubt that a "significant purpose" of the investigation was to obtain legal advice.

Ultimately, the considerations in conducting internal investigations frequently involve balancing the need to review allegations quickly, efficiently, and thoroughly, with the desire to ensure privilege protection. In this balancing, considering the importance of ensuring privilege protection at the outset provides corporate legal departments the opportunity to think through the appropriate approach in advance, and to be best positioned to establish that a review was, in fact, conducted at the direction of attorneys, and that a significant purpose of the investigation was to obtain or provide legal advice.

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