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D.C. Circuit Court Clarifies Scope of Attorney-Client Privilege in Internal Investigations

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On June 27, 2014, the United States Court of Appeals for the District of Columbia Circuit issued an opinion clarifying the application of the attorney-client privilege in internal investigations.

In *In re Kellogg Brown & Root, Inc.*, _____ (June 27, 2014) (available [here](#)), the D.C. Circuit rejected a narrow construction of the Supreme Court's seminal *Upjohn* decision, which held that the attorney-client privilege protects confidential employee communications made in a company's internal investigation. The District Court had previously issued an order limiting the application of the attorney-client privilege to internal investigations whose *primary* purpose was to obtain legal advice. Recognizing that internal investigations are often motivated by many equally important factors, the Court of Appeals reversed the District Court and held that the attorney-client privilege applies if obtaining legal advice was a *significant* purpose of the investigation "even if there were also other purposes[.]" *Id.* at 7-8.

In 2005, former Kellogg Brown & Root, Inc. ("KBR") employee, Harry Barko, filed a False Claims Act complaint against KBR alleging that it defrauded the U.S. Government in connection with certain military contracts. *Id.* at 2. During discovery, Barko sought documents related to a prior internal investigation that KBR's Law Department initiated pursuant to the company's Code of Business Conduct. *Id.* KBR argued that the documents were protected by the attorney-client privilege because the investigation was conducted for the purpose of obtaining legal advice. *Id.* at 2-3. The District Court disagreed, holding that the privilege did not apply because the investigation was undertaken pursuant to regulatory law and corporate policy "rather than for the purpose of obtaining legal advice." *Id.* at 3 (citation omitted).

The District Court distinguished this case from *Upjohn* on three factual grounds: (1) KBR's investigation was conducted in-house without consulting outside lawyers; (2) many of KBR's interviews were conducted by non-attorneys; and (3) the confidentiality agreements signed by KBR employees did not state that the purpose of the investigation was to obtain legal advice. *Id.* 6-7. Additionally, the District Court emphasized that, unlike in *Upjohn*, the KBR internal investigation was conducted in order to comply with regulations that required compliance programs to be maintained and internal investigations to be performed in response to allegations of misconduct. *Id.* at 7. Thus, the District Court concluded that the purpose of the internal investigation was to comply with the regulatory requirements, not to "obtain or provide legal advice." *Id.*

The Court of Appeals rejected the District Court's *Upjohn* distinctions. First, the Court determined that *Upjohn* did not hold that the involvement of outside counsel is necessary for the attorney-client privilege to apply to internal investigations. *Id.* at 6. The D. C. Circuit reiterated that "a lawyer's status as in-house counsel 'does not dilute the privilege.'" *Id.* (citation omitted). Second, the Court noted that, while KBR's interviews may have been conducted by non-attorneys, they were done at the direction of attorneys in the company's Law Department. *Id.* The Court emphasized that communications made to and by agents of attorneys in internal investigations "are routinely protected by the attorney-client privilege." *Id.* . Third, and finally, the Court concluded that "nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation." *Id.* at 7.

Ultimately, the Court summarily rejected the District Court's "primary purpose" test because it eliminated the attorney-client privilege for communications "made for both legal and business purposes[.]" *Id.* at 9. The proper question is not whether obtaining legal advice is the primary purpose of the investigation, but rather, whether it is a significant purpose. If obtaining legal advice is one of the significant purposes of the internal investigation, the privilege applies despite the existence of other, equally important purposes.

Technically, now, the status quo remains unaffected: the attorney-client privilege applies to confidential employee communications provided in connection with internal investigations. Nevertheless, the D.C. Circuit's decision crystallizes the scope of the attorney-client privilege for companies contemplating internal investigations in response to regulatory concerns. Furthermore, the opinion simultaneously recognizes the fact that companies may initiate internal investigations for numerous reasons, while refusing to penalize them for it.