

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

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The D.C. Circuit issued a decision on June 27 [*In re: Kellogg Brown & Root, Inc.*](#) ("KBR"), a closely-watched case about whether the attorney-client privilege applies to documents relating to an internal investigation undertaken pursuant to a company's code of business conduct. In determining whether a corporate document is an unprivileged business or a privileged legal communication, most courts analyze whether a "primary purpose" of the document was for obtaining or providing legal advice. The D.C. Circuit clarified the "primary purpose" test by holding that a corporate communication may have *more than one primary purpose* and stated the test as follows: "Was obtaining or providing legal advice a primary purpose of the communication, meaning *one of the significant purposes* of the communication?"

Background

Plaintiff Harry Barko, who worked for KBR, filed suit as a whistleblower under the False Claims Act alleging that KBR and subcontractors defrauded the United States by inflating costs and accepting kickbacks while administering military contracts in Iraq. Plaintiff Barko sought discovery of documents relating to KBR's prior internal investigation relating to the alleged fraud. The internal investigation was conducted pursuant to KBR's Code of Business Conduct which is overseen by the company's law department. Defendant KBR argued that the internal investigation was undertaken for the purpose of obtaining legal advice and therefore the internal investigation documents were protected by the attorney-client privilege. The district court found that KBR's internal investigation documents were not privileged because KBR had not shown the communications relating to the internal investigation would not have been made "but for" the fact that legal advice was sought.

D.C. Circuit Articulated Test for Privilege: Was Obtaining or Providing Legal Advice "*One of the Significant Purposes*" of the Communication?

The D.C. Circuit rejected the "but for" standard applied by the district court as not appropriate for analyzing the attorney-client privilege. As the D.C. Circuit noted, the attorney-client privilege apparently would not apply under the district court's standard unless the sole purpose of the communication was to obtain or provide legal advice. The D.C. Circuit recognized that such an approach would eliminate the attorney-client privilege for communications that are made for both legal and business purposes. The D.C. Circuit also expressed concern that the district court's standard "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 turn, this would have a chilling effect on companies' willingness to disclose facts and to seek legal advice, limiting corporate counsel's ability to ensure their client's compliance with the law.

The D.C. Circuit stated that 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. Rather, the D.C.

Circuit adopted a more precise and predictable test: “Was obtaining or providing legal advice a primary purpose of the communication, meaning *one of the significant purposes* of the communication?” Therefore, in the context of a corporation’s internal investigation, if *one of the significant purposes* of the internal investigation was to obtain or provide legal advice, the privilege will apply. The D.C. Circuit noted that this would be true whether an internal investigation was conducted pursuant to a company’s compliance program required by statute or regulation, or was otherwise conducted pursuant to a company policy.

D.C. Circuit also Underscored the Supreme Court’s *Upjohn* Decision to Recognize the Attorney-Client Privilege for Corporations

In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court held that the attorney-client privilege applies to corporations. The district court had distinguished *Upjohn* for various reasons, but the D.C. Circuit held that none of those purported distinctions were valid. *First*, *Upjohn* does not hold or imply that the involvement of outside counsel in internal investigations is a necessary predicate for the privilege to apply. *Second*, even though many of the interviews during the KBR investigation were conducted by non-attorneys, the investigation was conducted at the direction of attorneys in KBR’s legal department and communications made by/to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. *Third*, *Upjohn* does not require a company to use magic words in communications with its employees (i.e., expressly informing employees interviewed that the purpose of the interview was to assist the company in obtaining legal advice) in order to gain the benefit of privilege for an internal investigation. *Finally and most importantly*, the attorney-privilege applied to KBR even though its internal investigation was undertaken to comply with federal regulations that require defense contractors to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The D.C. Circuit emphasized that “so long as obtaining or providing legal advice was *one of the significant purposes* of the internal investigation, the attorney-client privilege applies, 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.”

Implications of the Decision

The *KBR* decision confirms that the corporate attorney-client privilege is alive and well in the D.C. Circuit, and the decision may influence courts in other circuits faced with a similar question. Also, corporate counsel in the Fifth Circuit may take comfort in the recent decision reported at *Exxon Mobil Corp. v. Hill*, 751 F.3d 379 (5th Cir. 2014), in which the Fifth Circuit held that the attorney-client privilege applied to an in-house counsel’s memorandum providing advice on a transactional matter. Though the Fifth Circuit in *Exxon* “recognize[d] that in-house counsel can often play a variety of roles within an organization,” the Fifth Circuit upheld the corporation’s attorney-client privilege because the record before it was “devoid of any indication that [in-house counsel] was providing business advice divorced from its legal implications.” Accordingly, as with the D.C. Circuit in the *KBR* case, the Fifth Circuit upheld a corporation’s attorney-client privilege when a purpose of the communication was to provide legal advice.

In conclusion, a corporation’s odds of successfully asserting the attorney-client privilege over internal investigation communications are increased if there is a record demonstrating that an important purpose of the communications was to obtain or provide legal advice. For example:

1. The investigation should be overseen by legal counsel, and any non-lawyer investigators should report to, and do the investigation at the direction of, such counsel.

2. Investigators should give interviewees *Upjohn* warnings that the interview is for the purpose of the company obtaining legal advice, the interview should be kept confidential, and the privilege belongs to the company, not the interviewee. Also, investigators should contemporaneously document the fact that *Upjohn* warnings were given.
3. The privileged nature of internal investigation communications should be documented, particularly for communications involving only non-lawyers where the privileged nature of a communication may not be apparent on its face. For example, legal counsel overseeing the internal investigation could direct that non-lawyer senders of internal investigation communications should include a header in such communications demonstrating that they are made under the direction of counsel and are protected by the attorney-client privilege.

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