



## *In re: Kellogg Brown & Root, Inc., et al.*: D.C. Circuit Grants Petition for Mandamus and Protects Attorney–Client Privilege of Internal Investigation in False Claims Act Case

In March 2014, we issued an *Alert* summarizing a decision issued by the U.S. District Court for the District of Columbia in *United States ex rel. Barko v. Halliburton Co., et al.*<sup>1</sup> The District Court granted a relator’s motion to compel and ordered defendants to produce documents reflecting the results of an internal investigation related to the subject matter of the relator’s complaint. Our *Alert* warned that the District Court’s decision presented troubling implications for companies—particularly in regulated industries—and specifically their ability to conduct internal audits and investigations without using outside counsel. Further, our *Alert* suggested that the District Court’s decision misconstrued and misapplied the United States Supreme Court’s decision in *Upjohn Co. v. United States*.<sup>2</sup>

The D.C. Circuit, on petition for writ of mandamus,<sup>3</sup> stayed the District Court’s document production order and held oral argument on the mandamus petition. In its June 27, 2014 decision, the D.C. Circuit granted the petition for writ of mandamus and vacated the District Court’s production order.<sup>4</sup> The D.C. Circuit confirmed that *Upjohn* is the standard by which the attorney–client privilege should be judged when assessing whether

confidential employee communications made during a company’s internal investigation led by company lawyers will be protected by the attorney–client privilege. It particularly emphasized that the test for applying the privilege is whether obtaining or providing legal advice was “a primary purpose of the communications,” rejecting the rule that the privilege applies only if the communication would not have been made but for the fact that legal advice was sought.

### Background and the District Court’s Decision

KBR asserted attorney–client privilege and work product protection in response to relator’s requests for “internal audits and investigations” into the alleged misconduct and the related subject matter. The investigations were undertaken by a director of the Code of Business Conduct (“COBC”) organization and completed by a team of non-lawyers, following receipt of an employee tip about potential misconduct. After the investigations were completed, summary reports were prepared and forwarded to the company’s law department.

The District Court reviewed the summary investigative reports and ruled that they were not protected by the attorney–client privilege or the attorney work product doctrine. The District Court found that the investigations were “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.” The District Court referred to Department of Defense regulations that “require contractors to have internal control systems such as [defendants] COBC program” so that reported instances of alleged misconduct can be investigated and reported. Applying a “but for” test used to determine the applicability of the attorney–client privilege, the District Court concluded that the implementation of these “routine corporate, and apparently ongoing, compliance investigation[s]” was nothing more than the company’s implementation of DOD requirements.

The District Court also found persuasive that employees interviewed by COBC investigators were not expressly advised that the purpose of these investigations was to obtain “legal advice.” According to the District Court, the absence of this express notice was evidence that the reports were not protected under the attorney–client privilege. Finally, the District Court noted additional characteristics of the investigation that weighed against the privilege, including that employees were asked to sign confidentiality statements that discussed only potential “adverse business impact”—and not legal implications—if disclosures were made. Finally, the interviews were conducted by non-attorneys.

The District Court also held that the documents were not protected under the work product doctrine. The District Court again emphasized that the investigation was conducted “in the ordinary course of business” pursuant to DOD regulatory requirements; thus, the documents were not prepared in anticipation of litigation. In addition, the court highlighted timing, particularly the fact that the investigations were conducted years prior to the unsealing of the *qui tam* litigation.

### ***United States v. Upjohn***

In *Upjohn*, the Supreme Court held that the attorney–client privilege applies to corporations. The privilege was applicable—indeed “essential”—because of the “vast and complicated array of regulatory legislation confronting the modern

corporations” that required them to “constantly go to lawyers to find out how to obey the law, ... particularly since compliance with the law in this area is hardly an instinctive matter.”<sup>5</sup> In *Upjohn*, the communications were made by company employees to company attorneys during an attorney-led investigation to ensure compliance with the law.<sup>6</sup> The Supreme Court held that the privilege applied to the internal investigation and covered the communications between company employees and company attorneys.

### **The D.C. Circuit’s Mandamus Decision**

The D.C. Circuit held that KBR’s “assertion of the privilege in this case is materially indistinguishable from *Upjohn*’s assertion of the privilege in that case.”<sup>7</sup> The D.C. Circuit then rejected all of the District Court’s prior efforts to distinguish KBR’s arguments regarding the application of *Upjohn*.

The D.C. Circuit rejected the District Court’s “but for” test for applying the privilege, under which the lower court had found that the duty under Department of Defense regulations to adhere to compliance programs meant that the “primary purpose” of the investigation could not be to obtain or provide legal advice. Many courts—including the D.C. Circuit—have used the “primary purpose” test to resolve disputes when attorney–client communications may have both legal and business purposes. The D. C. Circuit emphasized that the question is simply whether obtaining or providing legal advice was “a” primary purpose of the communication—one of the significant purposes—so the privilege can apply even if the communication also had a business purpose. There is no need for “a rigid distinction” between legal and business purposes. To clarify the law, the circuit court explained this rule and its logic at length:

In our view, the District Court’s analysis rested on a false dichotomy. 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.

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Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find the one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate 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? As the Reporter's Note to the Restatement says, "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT §72, Reporter's Note, at 554. We agree with and adopt that formulation—"one of the significant purposes"—as an accurate and appropriate description of the primary purpose test.

The D.C. Circuit also ruled that investigators are not required expressly to inform interviewed employees that the purpose of the interview is to assist the company in obtaining legal advice. Nothing in *Upjohn* requires "a company to use magic words" to gain the benefit of the privilege for an internal investigation. In KBR's investigation, as in *Upjohn*, employees knew that the legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. In fact, KBR employees were told not to discuss their interviews without the specific advance authorization of company counsel.

That many of the interviews in the investigation were conducted by non-attorneys was not dispositive. The investigation

was conducted at the direction of attorneys in KBR's legal department. The D.C. Circuit held that communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the privilege.

And, finally, the D.C. Circuit ruled that *Upjohn* did not require or hold that involvement of outside counsel was a necessary prerequisite for the privilege to apply.

*KBR* reaffirms important principles established in *Upjohn* and clarifies that internal investigations are still protected by the attorney–client privilege even when required by government regulation. In light of *Upjohn* and *KBR*, companies conducting internal investigations should be mindful of certain "best practices" to follow:

1. Companies should promptly engage lawyers—whether in-house or outside—when conducting internal investigations that they may want to protect from discovery.
2. Counsel should oversee the investigation and be prepared to demonstrate that oversight and involvement.
3. To the extent possible, counsel should draft written reports and memoranda.
4. All communications concerning the investigation should be properly marked as containing privileged and confidential attorney–client and/or work product information.
5. Oral conversations concerning the investigation should include counsel.
6. Employees should be provided *Upjohn* warnings at the beginning of any interview, regardless of who is conducting it.
7. Particularly if counsel is not conducting an interview or part of a communication, employees should be instructed that the investigation is being conducted under the authority of legal counsel and for the purpose of providing legal advice.
8. Finally, a company should consider retaining outside counsel if the sensitivity or breadth of the investigation will likely be significant or at least greater than its in-house counsel can manage, or if the company feels it necessary or appropriate to use counsel experienced in conducting internal investigations and in implementing the "best practices" identified above.

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## Endnotes

- 1 Relator sued Kellogg Brown & Root (“KBR”), its parent Halliburton Co., and other entities. Relator had previously worked for KBR. The District Court decision is captioned *Halliburton*, but the D.C. Circuit decision is captioned *KBR*.
- 2 See 449 U.S. 383 (1981).
- 3 KBR asked the District Court to certify the privilege question for interlocutory appeal and to stay its order pending petition for mandamus. The District Court denied both requests.
- 4 See *In re: Kellogg Brown & Root, Inc., et al.*, 2014 U.S. App. LEXIS 12115 (D.C. Cir. June 27, 2014).
- 5 449 U.S. at 392.
- 6 *Id.* at 392, 394.
- 7 2014 U.S. App. LEXIS 12115 at \*6.

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