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ATTORNEY-CLIENT PRIVILEGE**D.C. Circuit Steadies the ‘Barko’ Bus:
Clarification of the Attorney-Client Privilege in Corporate Internal Investigations**

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Protecting the attorney-client privilege is a critical concern for corporations conducting internal investigations. This concern was heightened in March 2014 when a federal district court ordered a group of corporate entities (“KBR”) to disclose

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investigation-related documents allegedly protected by the attorney-client privilege.¹ After the *Barko* order, both in-house and outside counsel were left to grapple with whether the attorney client privilege continued to protect internal investigations that were initiated to both provide legal advice and to determine compliance with corporate policies and/or applicable regulations.

Recognizing that *Barko* threatened to “vastly diminish the attorney-client privilege in the business setting” and “upend certain settled understandings and practices” for internal investigations, a three-judge panel of the D.C. Circuit vacated the order.² Earlier this month, the full appeals court rejected a petition for an en banc rehearing of the ruling.³

This article discusses the D.C. Circuit’s reasoning as well as helpful clarifications of the attorney-client privilege in the context of corporate internal investigations.

The ‘Barko’ Background and Context

Harry Barko filed a federal whistle-blower lawsuit, alleging that KBR and certain subcontractors defrauded

¹ United States *ex rel.* Barko v. Halliburton Co., No. 1:05-cv-1276, 2014 BL 65088 (D.D.C. Mar. 6, 2014) (12 CARE 353, 3/28/14).

² *In re Kellogg Brown & Root, Inc.*, No. 14-5055, 2014 BL 180217, at *7 (D.C. Cir. June 27, 2014) (12 CARE 753, 7/4/14).

³ (12 CARE 1064, 9/5/14).

the U.S. government by inflating costs and accepting kickbacks related to military contracts in Iraq.⁴ In discovery *Barko* sought documents related to KBR's prior internal investigation of the alleged fraud. KBR conducted the internal investigation under its Code of Business Conduct, which its legal department oversaw. KBR argued that the internal investigation had been conducted to obtain legal advice, and the resulting documents therefore were protected by the attorney-client privilege. *Barko* disagreed, contending that the documents were unprivileged business documents subject to disclosure.⁵

The district court sided with *Barko*. In support of its production order, the district court first distinguished the case from *Upjohn Co. v. United States*, 449 U.S. 383 (1981).⁶ The district court also held that the attorney-client privilege did not apply because, among other reasons, KBR failed to show that the disputed investigation materials "would not have been made 'but for' the fact that the legal advice was sought."⁷ Instead, the court found that KBR conducted the internal investigation for regulatory compliance and corporate policy concerns.⁸

KBR opposed the ruling as legal error and ultimately petitioned for a writ of mandamus. The D.C. Circuit agreed with KBR and found legal error for five reasons.

Lack of Outside Lawyers Does Not Destroy the Privilege

The district court distinguished the case from *Upjohn* by noting that KBR's internal investigation was conducted without outside lawyers.⁹ The D.C. Circuit, however, made clear that a lawyer's position as in-house counsel "does not dilute" the attorney-client privilege.¹⁰ *Upjohn* simply does not require outside counsel as a condition precedent for the privilege to apply.¹¹

Interviews Should Be Conducted at the Direction of Attorneys, but Not Necessarily by Attorneys

The D.C. Circuit opined that the district court also improperly contrasted *Upjohn* because many of the KBR investigative interviews were conducted by non-lawyers. As the D.C. Circuit explained, communications with non-lawyer agents of attorneys in internal investigations are "routinely protected by the attorney client privilege." Moreover, KBR's investigation was conducted "at the direction of" KBR's in-house attorneys.¹²

Magic Words Are Not Required

Next, the district court identified that the *Upjohn* interviewees were expressly informed that their interviews were conducted to assist the company in obtaining legal advice. The district court was critical that the KBR interviewees were not likewise informed, either in their interviews or in their confidentiality agreements.¹⁴ However, the D.C. Circuit correctly stated that "nothing in *Upjohn* requires a company to use magic words to its

employees" for the attorney-client privilege to attach in an internal investigation. In any event, the KBR employees were told not to discuss their interviews without permission from KBR's legal department and knew that the legal department was conducting a sensitive investigation.¹⁵

The 'but-for' Test Does Not Apply

The D.C. Circuit then held that "[t]he but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis."¹⁶ Applying a but-for test not only would "eliminate" the privilege for business communications with dual business and legal purposes, but also would "eradicate" the privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs. The court recognized that such businesses comprise "a significant swath of American industry." The result would chill disclosure by businesses to their attorneys and limit those attorneys' ability to counsel their clients.¹⁷

Legal and Business Purposes Are Not Mutually Exclusive

Many courts use the primary purpose test, like the district court did, to determine whether an attorney-client communication is made for both legal and business purposes.¹⁸ The D.C. Circuit, however, clarified that the primary purpose test does not require a solitary purpose. "So long as obtaining or providing legal advice [is] one of the significant purposes of the internal investigation, the attorney-client privilege applies." This remains true even if there are "other purposes for the investigation" and "even if the investigation was mandated by regulation rather than simply an exercise of company discretion."¹⁹ Thus, blended purposes do not automatically destroy the attorney-client privilege in internal investigations.

As a final legal point, although the D.C. Circuit vacated the *Barko* order, it stressed a key point: the attorney-client privilege protects disclosure of communications, not the underlying facts.²⁰ In other words, although the *Barko* plaintiff could pursue the facts underlying KBR's investigation, he "was not entitled to KBR's own investigation files." This distinction is practical and prudential. Shielding information under the attorney-client privilege means that "potentially critical evidence may be withheld from the fact finder. . . . But our legal system tolerates this situation." By allowing "full and frank communication" between attorneys and their clients, the attorney-client privilege promotes "broader public interests in the observance of law and the administration of justice."²¹

Conclusion

Although KBR won the privilege battle, the dispute demonstrates that a significant purpose of an internal investigation must be for counsel to render legal advice; moreover, counsel must direct and control the investi-

⁴ *In re Kellogg*, 2014 BL 180217, at *1.

⁵ *Id.*

⁶ *Id.* at *2-3.

⁷ *Id.* (quoting *Barko*, 2014 BL 65088, at *2).

⁸ *Id.* (quoting *Barko*, 2014 BL 65088, at *3).

⁹ *In re Kellogg*, 2014 BL 180217, at *3.

¹⁰ *Id.* (internal quotation marks omitted).

¹¹ *Id.*

¹² *Id.*

¹⁴ *Id.* at *3-4.

¹⁵ *Id.* at *4.

¹⁶ *Id.* at *5.

¹⁷ *Id.*

¹⁸ *Id.* at *5.

¹⁹ *Id.*

²⁰ *Id.* at *10.

²¹ *Id.* (internal quotation marks omitted).

gation. Accordingly, even with *In re Kellogg*'s reaffirmation of the attorney-client privilege in corporate internal investigations, corporations and their attorneys must take precautions to protect the privilege. Indeed, a federal district court judge in Massachusetts recently distinguished *In re Kellogg* and refused to apply the attorney-client privilege over certain internal employee communications "which are not communicated to

counsel and do not even appear to contain information intended to be conveyed to counsel."²⁵

Ultimately, corporations are best protected when counsel conduct and control investigations, communications are treated in a confidential manner, *Upjohn* warnings are delivered to interview subjects, and it is documented that legal advice was a significant purpose of the investigation.

²⁵ Szulik v. State St. Bank & Trust Co., No. 12-10018-NMG, 2014 BL 222007, at *4 (D. Mass. Aug. 11, 2014).