

Righting the Ship: The D.C. Circuit Overturns a Controversial District Court Ruling and Restores the Attorney-Client Privilege for Government Contractor Investigations

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A panel of the U.S. Court of Appeals for the D.C. Circuit today issued a unanimous opinion in *In re: Kellogg Brown & Root* (No. 1:05-cv-1276), granting KBR's petition for a writ of mandamus and vacating a controversial district court order that threatened to undermine the attorney-client privilege in investigations by government contractors.

The U.S. District Court for the District of Columbia's March 6, 2014 order rejecting privilege claims in *U.S. ex rel. Barko v. Halliburton*, Case No. 1:05-cv-1276, garnered widespread attention for its potential impact on government contractors. The District Court concluded that documents Kellogg Brown & Root ("KBR") generated during a Code of Business Conduct ("COBC") investigation were not protected by the attorney-client privilege or the work product doctrine because the COBC investigation was a "compliance investigation" undertaken pursuant to "regulatory law" and "corporate policy." Not surprisingly, the district court's ruling caused great concern among government contractors and other companies that conduct internal investigations in order to comply with "regulatory law" or "corporate policy."

The D.C. Circuit provided significant comfort to government contractors and many other companies by granting KBR's mandamus petition and vacating the district court's document production order. In a unanimous opinion authored by Judge Brett Kavanaugh, the D.C. Circuit concluded that the district court's decision was irreconcilable with the Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Of particular importance, the D.C. Circuit expressly rejected the district court's "but for" test for application of the attorney-client privilege to internal investigations. The district court had concluded that under the traditional "primary purpose" test for the attorney-client privilege, 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. As the D.C. Circuit summarized this "but for" test, "if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply." Because one of the purposes of KBR's internal investigation was to comply with the Department of Defense regulations that require defense contractors to maintain compliance programs and conduct internal investigations into allegations or evidence of misconduct, the district court concluded that KBR could not meet the "but for" test and that the privilege did not apply.

The D.C. Circuit's order rejected the district court's analysis as resting on a "false dichotomy." The D.C. Circuit rejected the "but for" test, stating that "[s]o 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." (Emphasis added) The D.C. Circuit explained 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." The court noted that because defense contractors are subject to regulatory requirements such as those mentioned above, "the logic of the ruling would seemingly prevent any defense contractor from invoking the attorney-client privilege to protect internal investigations undertaken as part of a mandatory disclosure program."

The D.C. Circuit concluded that a court should not try to find *the* one purpose for an investigation that can have multiple purposes. Instead, the court articulated the following test: “Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?” (Emphasis in original)

The court provided clear guidance, stating that “if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.” The court concluded that there was “no serious dispute” that one of the significant purposes of KBR’s investigation was to obtain or provide legal advice.

Although the D.C. Circuit vacated the district court’s document production order, the D.C. Circuit did note that the district court may consider any other arguments that the plaintiff may have timely asserted for why the documents in question are not covered by the attorney-client privilege or the work-product protection.

Judge Kavanaugh’s opinion concluded with what may have been a touch of self-deprecating humor among two of the judges on the panel. The opinion ends with a quote from *Swidler & Berlin v. United States*, in which the Supreme Court held that the attorney-client privilege continued to protect the confidentiality of notes of conversations between Deputy White House Counsel Vince Foster and his private attorney even after Mr. Foster’s death. Judge Kavanaugh was on the losing side of that argument, having argued the case in the Supreme Court on behalf of Whitewater Independent Counsel Kenneth Starr. Another member of the D.C. Circuit’s *KBR* panel, Judge Sri Srinivasan, was a law clerk for Justice Sandra Day O’Connor when she authored the dissenting opinion in that case.

Conclusion

The D.C. Circuit provided significant comfort to government contractors and other companies by articulating a clear test that is far more protective of the attorney-client privilege than the district court’s “but for” test. Under today’s opinion from the D.C. Circuit, the attorney-client privilege applies to internal investigations where obtaining or providing legal advice was *one of* the significant purposes of the investigation.

If you would like to discuss the information contained within this Alert or other related matters in more detail, please contact:

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