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Privilege

Attorney-Client Privilege Protection in Internal Investigations Upheld by D.C. Circuit: Good News for Corporate Counsel



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In a much-anticipated decision, the D.C. Circuit clarified the general test for the applicability of the attorney-client privilege in internal investigations. *In re Kellogg Brown & Root, Inc.*, 14-5505, 2014 WL 2895939 (D.C. Cir. June 27, 2014). The court unanimously rejected the district court's holding that a communication is privileged only if it would not have been made "but for" the purpose of seeking legal advice. Although a few district courts have followed this narrow "but for" test, corporate counsel rightfully feared that other courts would follow suit and narrow the protection generally afforded to internal investigations that are often done to comply with regulatory or business requirements and to seek legal advice. In rejecting the "but for" test, the D.C. Circuit looked to the lessons learned from *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) and broadly held that communications in internal investigations are privileged not only where the single primary purpose of an investigation is to provide legal advice, but also if that is "one of the significant purposes" of the investigation.

The Facts

In June 2007, plaintiff-relator Henry Barko, a former contract administrator for Kellogg, Brown and Root ("KBR") in Iraq, filed a qui tam False Claims Act ("FCA") lawsuit against Halliburton and its former subsidiary, KBR. Barko alleged that KBR provided preferential treatment to subcontractors to inflate the costs of construction services on military bases in Iraq and passed on the inflated costs to the U.S. government.

Prior to Barko's complaint, which was unsealed in 2009, Halliburton had independently investigated these allegations from 2004 to 2006 based on an internal report of a potential Code of Business Conduct ("COBC") violation. The Director, COBC, a non-attorney, had decided to initiate an investigation. Non-attorney COBC investigators interviewed witnesses, reviewed documents related to the allegations and prepared reports on their findings. These reports were provided to the legal department among others at the company. The COBC function was under the umbrella of the legal department but no attorneys were involved until the reports were finalized.

During discovery, Barko requested production of documents related to KBR's internal audits and COBC investigations. KBR confirmed that responsive documents existed but objected to the production based on the attorney-client privilege and the work-product doctrine.

The District Court's Application of the 'But For' Test

The district court ordered KBR to produce the documents related to its internal investigation because it found that they were created for a business purpose, namely to comply with the Federal Acquisition Regulation's ("FAR") Mandatory Disclosure Rule (FAR 52.203-13), and not to obtain legal advice. *United States ex rel. Barko v. Halliburton Co.*, 1:05-CV-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014) vacated sub nom. *In re Kellogg Brown & Root, Inc.*, 14-5055, 2014 WL 2895939 (D.C. Cir.

June 27, 2014). Although the court recognized that the general test for the application of the attorney-client privilege is the “primary purpose” test – whether the communication was made primarily to secure legal advice – it narrowed its application by stating that the “but for” formulation is used to determine the primary purpose of a communication. The court stated that under the “but for” formulation, “[t]he party invoking the privilege must show ‘the communication would not have been made “but for” the fact that legal advice was sought.’”

The court held that KBR had not met its burden under the “but for” formulation because the investigation at issue would have been conducted pursuant to company policy and regulatory law “regardless of whether legal advice were sought.” Not surprisingly, the district court’s decision came in for much criticism because internal investigations are often conducted with dual purposes in mind: to comply with business or regulatory requirements and to seek legal advice in applying the law to the facts discovered. Moreover, such investigations may reveal a significant risk of future litigation and both in-house and outside counsel are often required to provide both business and legal advice since disclosure and litigation decisions will have both business and legal ramifications for the company.

The district court’s decision provided a narrow application of the commonly used “primary purpose” test. In its decision, the district court looked to significant facts in KBR’s conduct of the internal investigation, which lacked many of the traditional hallmarks of attorney-client privileged investigations. For example, KBR used non-attorneys to decide the direction of the investigation and to conduct interviews. Furthermore, those individuals did not advise interviewees that the interviews were privileged or that the purpose of the interviews was to assist KBR in obtaining legal advice. The district court emphasized that the documents at issue were drafted by a non-attorney investigator and sent to the general counsel’s office only after the investigation had concluded. These documents, including the final investigation report, did not identify possible legal issues for further review and did not request legal advice. Furthermore, outside counsel was not involved. Thus, because no legal advice was requested or offered, the district court concluded that the primary purpose of the investigations was to comply with federal contractor regulations, not to secure legal advice.

It is likely that the court’s in camera review provided an impetus for its decision on the attorney-client privilege protection. The court termed KBR’s investigation reports “eye-openers” because, in its view, the reports contained both direct and circumstantial evidence of fraud. The court emphasized that KBR itself placed these documents at issue by arguing in its summary judgment motion that the investigative reports did not evidence any misconduct. Thus, the court stated that KBR could not now “hide behind attorney-client privilege claims to avoid allowing the other side to test those facts.”

The Circuit Court Rejects the ‘But For’ Test and Upholds the Attorney-Client Privilege as Long as Obtaining Legal Advice is a ‘Significant Purpose’

On June 27, 2014, the D.C. Circuit granted KBR’s writ of mandamus on the attorney-client privilege issue and vacated the district court’s order requiring the production of the internal investigation documents. The court held that Upjohn squarely applied to the KBR internal investigation because the investigation “was conducted under the auspices of KBR’s in-house legal department, acting in its legal capacity” even though many of the interviews were conducted by non-attorneys. The court relied on Upjohn to make three main points: (1) Upjohn did not hold or imply that outside counsel is a necessary predicate for the privilege to apply; ¹ (2) communications made by non-attorneys serving as agents of attorneys, such as those individuals conducting interviews during an attorney-led internal investigation, are protected by the attorney-client privilege; and (3) Upjohn does not require companies to use “magic words” in employee interviews. In the Barko case, the employees were told not to discuss their interviews without advance authorization by KBR’s General Counsel.

Practice Tips

To help maximize the protections of the attorney-client privilege and the work product doctrine, companies should:

- ensure and document attorneys’ supervision of internal investigations;
- when feasible and appropriate, involve outside counsel;
- involve the company’s in-house attorneys or outside counsel early in the assessment and investigation of allegations;
- make it clear that internal investigations are conducted for the purpose of

obtaining legal
advice.

¹ But cf. *Overson v. Mitsubishi*, 2009 US Dist. LEXIS 9762 *2 (finding no privilege in communication between corporate officers and company's general counsel and cases cited therein); *Neuberger Berman Real Estate Income Fund Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 411 (D. Md. 2005) (finding no privilege because attorney client privilege applies only to communications made to an attorney in his legal, not business, capacity).

More importantly, the D.C. Circuit flatly rejected the “but for” formulation of the “primary purpose” test because it found no precedent for its use. ² The court reasoned that such an approach “would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege.” The court buttressed its rationale with the dichotomous reality faced by companies who must conduct internal investigations for compliance and regulatory purposes. The court cogently remarked:

² The court did not address *U.S. v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121 (D.C. 2012), on which the district court in *Barko* relied for the “but for” formulation or other cases using the but for analysis. See also *Neuberger Berman Real Estate Income Fund Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 410-11 (D. Md. 2005) (“but for” test adopted); *First Chicago Intern. v. United Exchange Co. Ltd.*, 125 F.R.D. 55 (S.D.N.Y. 1989) (articulating the “but for” test but finding that investigation documents created at corporate counsel's request were protected by the attorney-client privilege because they would not have been created had the corporation not needed the advice of counsel); *Overson*, 2009 US Dist. LEXIS 9762 (“[C]ommunication between a corporation's employee and counsel should only be shielded if [it] would not have been made but for the client's need for legal advice or services.”) (quoting *First Chicago Int'l*, 125 F.R.D. at 57).

[T]he 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. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would ‘limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.’

(quoting *Upjohn*, 449 U.S. at 392.)

The court then recognized that business purposes and legal purposes in internal investigations are often inextricably intertwined. The court 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.” Because it can be “inherently impossible” to find the one primary purpose for a communication that is motivated by both legal and business purposes, the court stated that it is “not correct for a court to presume that a communication can have only one primary purpose.” Likewise, it is “not correct for a court to try to find the one primary purpose in cases where a communication plainly has multiple purposes.”

Saying that there can be more than one “primary” purpose would seem to torture the language to some extent, but the court went on to provide a clearer and eminently workable standard. The court held that the proper test for determining attorney-client privilege protection is “whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.” Using this significant purpose test, the privilege would apply to an organization's internal investigation 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, as long as one significant purpose was to obtain legal advice.

Counsel for the realtor has indicated in a news article that the relator plans to seek re-hearing en banc, in particular on whether the primary purpose of the internal investigation was legal advice. Given the diversity of views in the courts on the issue, the case may be headed for the Supreme Court.

Other Courts

In *Neuberger Berman Real Estate Income Fund Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398 (D. Md. 2005) the court noted that “courts have not reached any consensus as to the degree of predominance that must be assigned to the legal aspects of a communication” *Id.* at 410 (citation and internal quotation omitted). Indeed the case law varies significantly from court to court. Some courts have taken a broad view, similar to the D.C. Circuit in *Barko*, extending the privilege to any “communications intended to keep the attorney apprised of business matters” if those communications “embody an implied request for legal advice based thereon.” *Simon v. G.D. Searle & Co.*, 816 F. 2d 397, 404 (8th Cir. 1987) (internal quotation mark omitted).

Other courts have adopted a more narrow interpretation. They have insisted on identifying a single primary purpose for any analysis of attorney client privilege. “Where business and legal advice are intertwined, the legal advice must predominate for

the communication to be protected.” *Coleman v. ABC*, 106 F.R.D. 201, 206 (D.D.C. 1985). *U.S. v. Frederick*, 182 F.3d 496 (7th Cir. 1999) (communications to a lawyer who was preparing tax returns was not privileged because the client failed to demonstrate that the lawyer's provision of legal assistance was the principle purpose of the communications); , 213; “[i]f the document was prepared for purposes of simultaneous review by legal and non-legal personnel, it cannot be said that the primary purpose of the document is to secure legal advice.”); *F.T.C. v. TRW, Inc.*, 479 F. Supp. 160, 163 (D.D.C. 1979), judgment aff'd, 628 F.2d 207 (D.C. Cir. 1980) (same); *U.S. v. Chevron Corp.*, C-94-1885 SBA, 1996 WL 264769 (N.D. Cal. Mar. 13, 1996) amended, C 94-1885 SBA, 1996 WL 444597 (N.D. Cal. May 30, 1996) (same); *In re Trans-Industries, Inc.*, 2011 WL 1130431, *3 (N.D. Ohio 2011) (“In situations where there is mixed legal-business advice, the court must determine whether the predominant nature of the consultation was legal or business-oriented.”).

Best Practices

The general rule across jurisdictions is that the attorney-client privilege applies if the primary or predominant purpose of the attorney-client communication is to seek legal advice or assistance. However, some courts state that client communications to an attorney must be “solely” for the purpose of seeking legal advice for the privilege to apply. Neither the Supreme Court nor any Circuit courts have narrowed the “primary purpose” test to a “but for” or “sole purpose” formulation. But until *Barko* none had expanded it to the “significant purpose” test. Because other cases use different standards and because of *Upjohn's* admonition to examine each case on a “case by case” basis, the D.C. Circuit's expansive decision in *Barko* is not likely to change any of the internal investigation best practices that experience has taught prudent companies to use.

Both the district court and the circuit court decisions in *Barko* serve as a critical reminder that internal investigations, particularly compliance investigations in regulated industries, must be structured and performed with both the protections and limitations of the attorney-client privilege in mind. The applicability of the attorney-client privilege remains extremely fact-dependent.

Companies are well-advised to follow the general guidelines below to help maximize the protections of the attorney-client privilege and the work product doctrine:

- Ensure and document attorneys' supervision of internal investigations. Attorneys should define the scope of an investigation and provide direction on the interviews and document reviews to be conducted.
- When feasible and appropriate, involve outside counsel. While *Upjohn* made clear that in-house counsel may maintain privileged communications, there is a greater likelihood of maintaining the privilege in an investigation if it is conducted through outside counsel. Caselaw demonstrates that outside counsel are more likely to be viewed as operating within the confines of the attorney-client privilege and work product doctrines, as opposed to in-house attorneys who are often called upon to function in a business capacity.
- Structure compliance department investigations and reporting such that the company's in-house attorneys or outside counsel are involved early in the assessment and investigation of allegations.
- Include language in compliance and internal investigation communications and policies stating that the internal investigations are conducted for the purpose of obtaining legal advice.
- Use *Upjohn* letters to formally document the initiation of an internal investigation for the purposes of requesting or providing legal advice to the company. When non-attorneys will be involved in gathering information for the investigation, document that such actions are at the direction and under the supervision of the company's legal counsel for the purposes of providing legal advice to the company and defending against possible litigation. Better yet, simply use attorneys, preferably outside counsel, to conduct the interviews.
- Give *Upjohn* warnings to all interview subjects and clearly explain that the interviewers are acting at the direction of the company's legal counsel, that the contents of the interview will be shared with legal counsel, and that the purpose of the interview is to gather information in order to provide legal advice to the company and defend against possible litigation.
- Consider using employee confidentiality agreements stating that the purpose of the investigation is to obtain legal advice.
- Ensure that all attorney-client privileged communications and attorney work product generated in the course of an investigation are conspicuously marked as such, on every page of each document if possible.
- In the investigation report, include legal issues that need to be examined.

- Structure compliance functions so that they are under the direction of the legal department.