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## D.C. Circuit Vacates District Court Order Requiring Production of Documents from Internal Investigation

In *In re Kellogg Brown & Root, Inc.*, No. 14-5055 (D.C. Cir. June 27, 2014), the D.C. Circuit Court of Appeals held that attorney-client privilege applies to internal investigation materials, provided that a significant purpose of the investigation was to obtain or provide legal advice – even if it was not *the* significant purpose. Further, the Court held that this privilege applies to investigations regardless of whether they were conducted pursuant to a policy or regulation. The Court thus vacated a district court order requiring a defendant to produce documents from an internal investigation it had conducted pursuant to corporate policy implemented to comply with government regulations.

### Background

A whistleblower asserted claims under the False Claims Act alleging that KBR, a defense contractor, defrauded the U.S. government “by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq.” During discovery, the whistleblower sought documents relating to KBR’s prior internal investigation into whether, under federal law, it needed to report kickbacks or contractor fraud to the United States. KBR had initiated this investigation pursuant to its internal Code of Business Conduct (“COBC”), a set of policies the company implemented to comply with Department of Defense regulations requiring contractors to “facilitate timely discovery and disclosure of improper conduct in connection with Government contracts.” Under its COBC, after receiving tips of a potential compliance violation KBR would interview personnel, review relevant documents, obtain witness statements, and draft a report for its internal Law Department to review. KBR argued that, under *Upjohn Co. v. United States*, 449 U.S. 383 (1981), documents from its COBC investigation were protected by the attorney-client privilege; the Supreme Court in *Upjohn* had held that attorney-client privilege applies to communications from company employees to company attorneys made during an attorney-led internal investigation undertaken to ensure “compliance with the law.”

On March 6, 2014, the District Court for the District of Columbia ruled against defendants and ordered production of these documents. The district court first distinguished *Upjohn* on several grounds, including: (1) in *Upjohn*, the internal investigation began only after in-house counsel conferred with outside counsel; here, it was initiated and overseen only by in-house counsel; (2) in *Upjohn*, the internal investigation was conducted by attorneys; here, it was conducted by non-attorneys at the direction of in-house attorneys; and (3) in *Upjohn*, interviewed employees were expressly informed that the purpose of the interview was to assist with obtaining legal advice; here, this instruction was not given. The district court then applied a “but-for” test to determine whether the documents at issue were privileged, explaining that the attorney-client privilege applies only to communications that “would not have been made ‘but for’ the fact that legal advice was sought.” The court held that these documents were not privileged under this test because “[t]he COBC investigations resulted from Defendants’ need to comply with government regulations,” and therefore were “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.” After the district court denied KBR’s request to certify the issue for interlocutory appeal, KBR petitioned the court of appeals for a writ of mandamus.

## The D.C. Circuit Court's Decision

The D.C. Circuit Court of Appeals granted the petition for a writ of mandamus and vacated the production order, finding that the district court's privilege ruling was "legally erroneous," and that this error justified the "drastic and extraordinary" remedy of mandamus.

The court of appeals first refuted the district court's attempts to distinguish *Upjohn*. The court explained that: (1) for purposes of attorney-client privilege, it is irrelevant whether an internal investigation is initiated by in-house or outside counsel because "a lawyer's status as in-house counsel does not dilute the privilege"; (2) "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by attorney-client privilege"; and (3) there are no "magic words" that must be communicated to employees to invoke attorney-client privilege during an internal investigation where, as here, the employees know that the legal department is conducting an investigation and that the information they disclose will be protected.

The appellate court also held that "[t]he but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis" because it misinterpreted the circuit's "primary purpose" test. The D.C. Circuit explained that under the primary purpose test, a communication is privileged if obtaining or providing legal advice was "*a* primary purpose" of the communication, even if it was not "*the* one primary purpose." Thus, "[i]n the context of an organization's internal investigation, 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."

After finding the lower court's privilege ruling "clearly erroneous," the circuit court went on to hold that the three conditions necessary to grant a writ of mandamus were present: (1) the petitioner had "no other adequate means to attain the relief" he sought; (2) the petitioner's right to issuance of the writ was "clear and indisputable"; and (3) the court was "satisfied that the writ [was] appropriate under the circumstances." Significantly, the appellate court explained that the first of these elements "will often be satisfied in attorney-client privilege cases" because there is generally no other avenue for interlocutory appeal, and because appeal after final judgment would be inadequate once "the cat is out of the bag."

## Analysis

This opinion suggests that the attorney-client privilege can apply to documents created in the course of internal investigations—even those conducted pursuant to government regulations or company policies—so long as *one of the significant purposes* of the investigation is to obtain or provide legal advice. This reinforces the application of the privilege to communications made during an internal investigation, and protects companies that engage in in-depth, unbiased investigations to ensure compliance with laws and government regulations. Nonetheless, companies should be aware that not all courts employ a "primary purpose" test, and many that do still refer to *the* primary purpose (rather than *a* primary purpose) of a communication. It remains to be seen whether other courts will follow the D.C. Circuit's interpretation of this test. Further, note that the results of this investigation were intended for internal use—not for government regulators—and therefore that the selective waiver doctrine was not implicated; this opinion

may have limited applicability to internal investigations where results are expected to be turned over to regulators.

The opinion also broadens the scope of the attorney-client privilege—as applied to corporations—beyond the facts of *Upjohn*. Specifically, under the circuit court’s opinion, companies can have greater confidence that legal advice sought or obtained during an internal investigation will still be privileged even if (1) the investigation is initiated and run by in-house counsel but not outside counsel; (2) employee interviews are conducted by non-attorneys (at the direction of attorneys); or (3) the interviewed employees are not expressly told that they are being interviewed for the purpose of obtaining legal advice. Regarding the second point, although this gives companies more flexibility than many had assumed in the past, the court in this case did not reach the question of how much legal oversight over non-attorney interviewers is necessary to retain attorney-client privilege. Thus, for the time being, it remains safest to have lawyers conduct the interviews or, at the least, play a day-to-day role in the decisionmaking in the investigation.

Finally, the D.C. Circuit’s willingness to grant a mandamus petition—a “drastic and extraordinary” remedy—confirms that such petitions will often provide viable ways to appeal attorney-client privilege issues, as they permit appellate review before a party is irreparably harmed by disclosure of privileged documents. Nonetheless, the circuit court was careful to qualify its grant of this unusual remedy, noting that “appellate courts will often deny interlocutory mandamus petitions advancing claims of error by the district court on attorney-client privilege matters.”

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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