

## Litigation Alert

### D.C. Circuit Vacates Controversial KBR Ruling

*Appellate Court Reaffirms Protection of Attorney-Client Privilege and Attorney Work Product in Internal Investigations*

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The U.S. Court of Appeals for the D.C. Circuit recently issued a unanimous decision granting Kellogg Brown & Root's (KBR) petition for a writ of mandamus and vacating the district court's March 6 document production order. *In Re Kellogg Brown & Root, Inc.*, No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014). In its opinion, the Court of Appeals refuted each of the lower court's bases for rejecting KBR's claims of attorney-client privilege or attorney work-product protections, and reaffirmed the standards set by *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

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The Court of Appeals found that KBR's assertion of privilege was "materially indistinguishable" from *Upjohn*. "As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity." *In Re Kellogg Brown & Root, Inc.*, 2014 WL 2895939, at \*3.

The Court of Appeals explained its departure from the district court's decision and why the case remained "under *Upjohn's* umbrella":

- First, the fact that KBR conducted the investigation in-house without consultation with outside counsel did not matter because "*Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply."

- Second, although many of the interviews in KBR's investigation were conducted by nonattorneys, "the investigation here was conducted at the direction of the attorneys in KBR's Law Department." "[C]ommunications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."
- Third, despite the fact that the KBR employees interviewed were not expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, "nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here, as in *Upjohn*, employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected." *Id.*

More importantly, the Court of Appeals rejected the district court's determination that the purpose of KBR's internal investigation was to comply with regulatory requirements rather than to obtain or provide legal advice, finding that 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.

*Id.* at \*4 (emphasis added). The Court of Appeals explained that the "but-for test articulated by the district court is not appropriate for attorney-client privilege analysis" and "would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes." *Id.* Rather, in 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." *Id.* at \*5.

## Important Take-Aways for Companies

The KBR litigation demonstrates the critical importance of establishing a mandate and protocols for internal investigations at the outset to ensure that a company properly protects its attorney-client privilege and attorney work product, so as to avoid the

unintentional airing of its dirty laundry in litigation later on. The following are examples of steps a company can take to avoid challenges to privileged investigation materials:

- **Establish clear protocols for reviewing claims of ethical misconduct or potential violations of law that include steps needed to strengthen applicable privilege claims.** Companies should clearly document the role of their internal compliance review functions and internal investigations into alleged wrongdoing. Internal or outside counsel should direct the investigation, and if nonattorneys are involved in the process, the company should clarify in writing that those individuals are working at the direction of company counsel for purposes of seeking legal advice.
- **Make clear the purpose of any internal investigation and establish a record to support the assertion of the attorney-client privilege and attorney work-product doctrine from the outset (or as soon as the matter is identified as a potential legal problem).** At the onset of any investigation, companies should promptly document that one of the significant purposes of the investigation is to gather facts necessary to provide legal advice. The investigative team also should be directed to label any documents (including reports, emails and handwritten notes) intended to be covered by the attorney-client privilege or work-product doctrine as privileged, with a notation that the purpose of the memorialized communications was to gather facts necessary to provide legal advice.
- **Company employees should receive a proper *Upjohn* warning at the onset of an interview to ensure that the company memorializes the privilege.** The company should ensure that employees understand the nature of the investigation, the fact that it is being conducted for purposes of seeking legal advice and the relationship between the company and its counsel. This understanding should be documented in any report of conversations with employees. Companies should also give strong consideration to requiring attorneys to conduct employee interviews to protect future claims of privilege.

Of course, every investigation is different and raises its own unique issues. Regardless of whether a company decides to investigate using internal or external resources, it is well worth the time and effort to consult with experienced investigative counsel to set up a

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protective framework and investigative process that (i) preserves a company's legal privileges and rights, (ii) mitigates unnecessary litigation and compliance risk **and**, at the same time, (iii) meets its legal and ethical obligations and the heightened expectations of its stakeholders.

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