

ALERT

D.C. Circuit Reaffirms that Internal Investigations are Privileged

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Companies that do business with the government can breathe a sigh of relief. Today, the U.S. Court of Appeals for the D.C. Circuit rejected a controversial district court opinion that had required a government contractor to produce confidential internal investigation reports. Last March, a federal district court in Washington, DC sent shockwaves throughout the government contractor community when it ordered a company to produce confidential internal investigation reports, which the company claimed were covered by the attorney-client privilege, to a *qui tam* plaintiff in a False Claims Act case. Today, in a mandamus decision in *Kellogg Brown & Root*, the D.C. Circuit vacated the district court's decision. This decision reaffirms the broad application of the attorney-client privilege to communications and reports associated with internal investigations.

The controversy giving rise to today's decision arose after a *qui tam* plaintiff moved to compel production of investigation reports prepared by defendant Kellogg Brown & Root (KBR) that related to the fraud alleged in the *qui tam* plaintiff's complaint. Whereas KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice, and that the investigation documents and communications therefore were protected by the attorney-client privilege, the *qui tam* plaintiff argued that the investigation documents were simply business records, which were unprivileged and subject to discovery. The district court sided with the plaintiff and held that the internal investigation reports were not privileged. In reaching its decision, among other reasoning, the court looked to the fact that the internal investigation had been conducted pursuant to KBR's regulatory obligations under the Federal Acquisition Regulation (FAR). The district court also found it significant that many

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of the interviews during the investigation had been conducted by individuals who were not attorneys, and that the employees who were interviewed, though they signed confidentiality agreements, were not expressly informed that the investigation was being conducted for legal purposes.

Today, the D.C. Circuit determined that the district court's privilege ruling was clearly erroneous. In reaching its decision, the D.C. Circuit looked to Supreme Court precedent in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Characterizing the attorney-client privilege as the "oldest of the privileges for confidential communications known to the common law," the D.C. Circuit reiterated *Upjohn's* rule that privilege applies to internal investigations performed by in-house attorneys, and covers the communications between company employees and company attorneys.

Indeed, the D.C. Circuit found the privilege issues regarding KBR to be "materially indistinguishable" from the issues in *Upjohn*, noting that KBR had conducted its investigation "under the auspices of KBR's in-house legal department" to gather facts and ensure compliance with the law. According to the D.C. Circuit, that the investigation was conducted in-house, rather than in consultation with outside counsel, did not affect the privilege analysis. Further, the fact that many interviews were conducted by non-attorneys did not change the privileged status of the investigation, given that it was conducted at the direction of KBR's Law Department. Finally, the D.C. Circuit found irrelevant the fact that employees who were interviewed were not expressly informed that the investigation was for legal purposes—"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."

The appeals court also rejected the position that an internal investigation is not privileged if conducted pursuant to a regulatory requirement (like under the FAR). The D.C. Circuit recognized that this "novel approach" to the attorney-client privilege would "eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes" and would "eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs."

The D.C. Circuit went on to find that an internal investigation will be privileged if "one of the significant purposes" of the investigation was to provide legal advice, "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."

This decision is welcome news for companies that do business with the government, confirming that their internal investigations should continue to be protected by the attorney-client privilege, even if they are conducted with support from outside of their law departments or in response to regulatory requirements. Regardless, to minimize the risk of disclosure and avoid unnecessary (and potentially costly) litigation, it is still prudent to implement additional precautions that provide clear indicia that an investigation is privileged. As mentioned in more detail in our previous article, companies should consider:

- Authorizing investigations for the express purpose of obtaining legal advice and assessing litigation risk;

- Involving a lawyer in each stage of the investigation;
- Informing witnesses that the investigation is for the purpose of obtaining legal advice;
- Marking all communications with the appropriate privilege designations;
- Combining factual reports with legal analysis and impressions; and
- Retaining outside counsel.

Here, after extensive litigation, KBR was ultimately able to demonstrate that its internal investigation was privileged. However, for any internal investigation, a company would benefit from establishing the privileged nature of the investigation at the outset through early involvement of legal counsel, clear documentation concerning the purpose and scope of the investigation, and conduct throughout the process that is consistent with the privileged nature of the sensitive matters being investigated.