

THE PRACTICE

Court Broadens Confidentiality of Investigations

D.C. Circuit extends privilege in internal corporate probes, but inconsistent rulings remain.

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You are counsel to a government contractor that is conducting an internal investigation into possible fraud. Federal mandatory disclosure obligations require an investigation, as does the need to gather facts to seek legal advice. Is the investigation privileged? The U.S. Court of Appeals for D.C. Circuit recently answered with a resounding “Yes.”

In *In re Kellogg Brown & Root*, the D.C. Circuit provided a new test for the applicability of the attorney-client privilege to internal investigations. In welcome news for corporate counsel, 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.

The D.C. Circuit went even further and held that communications are privileged not only when the single primary purpose of an investigation is to provide legal advice, but also when that is “one of the significant purposes” of the investigation.

The facts. The plaintiff-relator Henry Barko filed a qui tam False Claims Act suit against his former



employer, Kellogg, Brown & Root (KBR). Barko alleged KBR inflated construction-services costs in Iraq and passed on the inflated costs to the U.S. government. The company had previously independently investigated these allegations based on an internal report of a potential code of business conduct violation.

In an approach not in keeping with best practices, a nonattorney who oversaw compliance with the code of conduct initiated the investigation. Although the function of the code was under the umbrella of the legal department, nonattorney investigators interviewed witnesses, reviewed documents related to

the allegations and prepared reports. Once finalized, the reports were provided to the legal department.

The “but for” test. The district court ordered KBR to produce its internal investigation documents because it found they were created for a business purpose: to comply with the Federal Acquisition Regulation’s Mandatory Disclosure Rule, and not to obtain legal advice. The “but for” test was not satisfied because the investigation would have been conducted pursuant to company policy and regulatory law “regardless of whether legal advice were sought.”

The “significant purpose” test. In granting KBR’s writ of mandamus, the D.C. Circuit held the privilege squarely applied to the documents because the investigation “was conducted under the auspices of KBR’s in-house legal department, acting in its legal capacity.” The appeals court flatly rejected the “but for” formulation of the “primary purpose” test. The court stated that in using the “primary purpose” test—the test used by most courts that have addressed the issue—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 do violence to the word “primary,” but the court went on to provide a clearer, thoughtful and

eminently workable standard that should warm the heart of corporate counsel across the nation. The court held the proper test for determining attorney-client privilege is “whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.” Using this test, the privilege would apply to an internal investigation regardless of whether it was conducted pursuant to company policy or legal requirements, as long as one significant purpose was to obtain legal advice.

Courts have not reached a consensus regarding privilege and internal investigation documents. Some have taken a broad view, similar to the D.C. Circuit, extending the privilege to communications intended to keep the attorney apprised of business matters if those communications “embody an implied request for legal advice based thereon.” Other courts have insisted on identifying a single primary purpose. As one court held, “[w]here business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.”

What is corporate counsel to do, given the confusing case law? Here are some general guidelines to eliminate any question that the primary purpose of an internal investigation is to seek legal advice.

First, ensure the legal department directs compliance functions.

Second, require and document attorneys’ initiation and supervision of internal investigations and

their purpose to provide legal advice. Attorneys should define the scope of an investigation and provide direction on interviews and document reviews.

Third, document nonattorneys’ actions to show they are taken at the direction and under the supervision of the company’s legal counsel to provide legal advice and defend against possible litigation. Better yet, simply use attorneys, preferably outside counsel.

Fourth, when feasible and appropriate, involve outside counsel. Although *Upjohn v. United States* made clear that in-house counsel may maintain privileged communications, the privilege is more likely to be preserved if outside counsel is used, because case law shows that in-house attorneys may sometimes be viewed as operating in a business capacity.

Fifth, give “*Upjohn* warnings” to interview subjects. 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 to provide legal advice to the company and defend against possible litigation.

Finally, ensure that all attorney-client privileged communications and attorney work product 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.



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