

## D.C. Circuit Grants KBR's Mandamus Petition, Protects Internal Investigation Files from Disclosure

White Collar Alert  
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As Miller & Chevalier reported in an [earlier alert](#), on May 7 the United States Court of Appeals for the District of Columbia Circuit heard oral argument on a *mandamus* petition filed in the matter of *United States ex rel. Barko v. Halliburton* (1:05-CV-1276, D.DC). On June 27, 2014, the Court granted KBR's petition, ruling that KBR could not be compelled to produce files relating to its internal investigations into allegations of waste, fraud and abuse associated with certain government contracts KBR administered in Iraq. In so doing, the Court rejected the district court's articulation of a new and unique "but for" test and its application of that test to determine such files were not protected from disclosure by the attorney-client privilege.

### **The District Court "applied the wrong legal test and clearly erred"**

The DC Circuit's opinion, written by Judge Kavanaugh, reviews the development of the attorney-client privilege in the corporate context, focusing on the Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) and finds that KBR's assertion of the privilege here "is materially indistinguishable from Upjohn's assertion of the privilege in that case." Op. at 5. Notably, the Court rejects each of the three bases upon which the district judge distinguished KBR's position from *Upjohn* -- KBR's failure to consult with outside counsel, the use of non-attorneys to conduct portions of the investigation, and KBR's purported failure to expressly inform interviewed employees that the purpose of the interview was to provide legal advice. Accordingly, the Court confirmed that the attorney-client privilege co-exists within the bounds of the modern realities of internal investigations where the technical nature and frequency with which issues must be investigated oftentimes requires the use of in-house resources working at the direction of legal counsel.

First, the Court held that "*Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply." Op. at 6. In re-confirming that "a lawyer's status as in-house counsel does not dilute the privilege," *Id.* (internal quotations and citations omitted), the Court moved the U.S. attorney-client privilege analysis away from the recent trends observed across the European Union, which weakened (or eliminated) the attorney-client privilege as to communications between in-house counsel and employees.

Second, the Court found that KBR's use of non-attorneys to conduct interviews did not strip the interviews of the privilege because the investigations were "conducted at the direction of attorneys in KBR's Law Department." *Id.* In this case, the KBR Law Department would refer internal tips or complaints to the Director of the Code of Business Conduct, which conducted the investigations using internal KBR resources before submitting a report back to the Law Department. The Court rejected the district court's conclusion that the use of non-lawyers to conduct interviews when the underlying investigations were directed by the Law Department somehow obviated the privilege, finding that "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney client privilege." *Id.* In so doing the Court re-affirmed the practices of many corporations that -- recognizing cost and resource limitations -- often rely on internal non-lawyer resources (working at the direction of counsel) such as internal audit, corporate security, and human resources to conduct portions of internal investigations.

Third, the Court rejected the district court's conclusion that the failure to inform employees they were being interviewed in order to assist the company *in obtaining legal advice* precluded the attachment of privilege to such conversations. The Court reviewed the facts and circumstances of the investigation and concluded that it was, in fact, conducted to assist the company in obtaining legal advice. The evidence of that intent was not undercut by a failure to inform employees of it, because "nothing in *Upjohn* requires a

company to use magic words to employees in order to gain the benefit of the privilege for an internal investigation." Op. at 7. Notwithstanding the Court's conclusion, prudent investigators will continue to include a reference to the purpose of the investigation in their opening *Upjohn* warnings to avoid any ambiguity about the purpose of the investigation and the intent to maximize privilege.

The Circuit then turned to the district court ultimate holding: That KBR's investigative files were not privileged because KBR had a regulatory duty to investigate the allegations and, as such, the investigation was not conducted for the purpose of gaining legal advice. The Court noted that the district court properly began its analysis with the "primary purpose" test used to resolve privilege issues when corporate communications have both legal and business purposes. The district court erred, however, in modifying that test into a "but for" standard, whereby the communications were only privileged if they would not have been made "but for" the purpose of seeking or providing legal advice. Such a construction of the privilege, the Court found:

"... rest[s] 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."

Op. at 7-8. The "but for" test, the panel concluded, "is not appropriate for attorney-client privilege analysis," is without support in any "Supreme Court or court of appeals decision," and 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." Op. at 8-9.

The Court then clarified the application of the "primary purpose" test, noting that when the test is "sensibly applied" it "cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." Op. at 9. As a result, it is "not correct" for a court to try to divine "the one primary purpose [of a communication] in cases where a given communication plainly has multiple purposes." Op. at 9-10 (emphasis in original). Rather, the proper articulation of the "primary purpose" test is: "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication." Op. at 10 (emphasis in original). Finding there to be no serious dispute that one of the "significant purposes" of KBR's internal investigations was to provide legal advice, the Circuit concluded that the lower court "applied the wrong legal test and clearly erred." Op. at 11.<sup>1</sup>

## ***Mandamus* Is Justified in this Case**

As our [earlier alert](#) observed, during oral argument the Circuit Court seemed skeptical of the underlying privilege ruling but struggled with whether *mandamus* review was appropriate. In granting KBR's petition, the Court found the three necessary conditions for a grant of *mandamus* satisfied: 1) the petitioner must have "no other adequate means to attain the relief" desired; 2) the petitioner must show her right to the writ is "clear and indisputable;" and 3) the court "in the exercise of its discretion must be satisfied that the writ is appropriate under the circumstances." Op. at 11.

The Court found the first condition easily satisfied. Because the collateral order doctrine prohibits interlocutory appeal of attorney-client privilege rulings (absent certification) and because an appeal of such rulings after a final judgment "comes too late" after confidential material has already been revealed, the court concluded that the first condition "will often be satisfied in attorney-client privilege cases." Op. at 12. And while "the first *mandamus* requirement is often met in [privilege cases] the second requirement is rarely met," the Court found the district court's error sufficiently "clear and indisputable" that *mandamus* was warranted. Op. at 14.

Finally, the Court conceded the third prong of the test to be "a relatively broad and amorphous totality of the circumstances consideration." Op. at 14. Indeed, perhaps hoping to avoid having every adverse privilege ruling yield a *mandamus* petition, the Court noted "even in cases of clear district court error on an attorney-client privilege matter, the circumstances may not always justify *mandamus*." *Id.* But, the Court noted the need for certainty and understanding in the privilege arena and wrote that the

district court's ruling:

"[R]elied on a number of factors that threaten to vastly diminish the attorney-client privilege in the business setting. Perhaps most importantly, the District Court's distinction of *Upjohn* on the ground that the internal investigation here was conducted pursuant to a compliance program mandated by federal regulations would potentially upend certain settled understandings and practices."

Op. at 14-15. The Court recognized the realities of business and the impact such rulings have on the provision of legal advice, noting, "prudent counsel monitor court decisions closely and adapt their practices in response. The amicus brief in this case ... convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning." Op. at 15.

## Final Observations

As the Court itself observed, its decision resolves the substantial uncertainty generated by the district court regarding the extent of the protection offered by the attorney-client privilege to corporate internal investigations, particularly those conducted with entirely "in-house" resources. The Court forcefully re-affirmed that the privilege extends to such investigations when they are lead or directed by counsel (including in-house counsel) even when non-attorneys are working at the direction of attorneys. Moreover, the Court re-affirmed that the privilege extends to in-house counsel communications with non-lawyers, even where such communications may serve a business, in addition to legal, purpose. In this regard, the opinion puts further distance between U.S. and E.U. jurisprudence regarding the reach of the privilege with regard to communications between in-house counsel and corporate employees.

The opinion closes with an important reminder, however, on the limits of what the privilege actually protects. The Court concludes that while the attorney-client privilege may protect disclosure of internal investigation reports and communications related to such investigations "it does not protect the disclosure of the underlying facts by those who communicated with an attorney." Op. at 17 (internal quotations and citations omitted). As a result, the relator was free to "pursue the facts underlying KBR's investigation. But he was not entitled to KBR's own investigation files." Op. at 18. It is important to keep this admonition in mind while conducting internal investigations and recall that such investigations are not able to completely shield underlying facts from discovery by civil litigants (and law enforcement agencies).

Miller & Chevalier will continue to monitor this matter and issue additional alerts as appropriate.

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<sup>1</sup> Although KBR also argued that the files were protected from discovery by the work product doctrine, the Circuit Court did not address this argument in its opinion.

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