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D.C. Circuit Clarifies Scope of Attorney-Client Privilege in Internal Investigations

Taking pains to preserve corporate privileges is a fundamental component of any well run internal investigation. A recent decision by the D.C. Court of Appeals, [*In re: Kellogg Brown & Root, Inc., No. 14-5055 \(June 27, 2014\)*](#), therefore provides a welcome clarification of how those protections apply in the context of an internal corporate investigation.

In *Kellogg Brown & Root*, the Court of Appeals took the unusual step of granting mandamus and vacating the lower court's order compelling the production of internal investigation materials. It did so in order to correct a decision that, if left standing, would have had, in the Court of Appeals' view, the potential to "disable most public companies from undertaking confidential internal investigations." As the D.C. Circuit explained, the lower court had so fundamentally misinterpreted *Upjohn Co. v. United States*, the 1981 Supreme Court precedent that first established the contours of the attorney-client privilege and attorney work product protections for corporations conducting internal investigations, that it "threaten[ed] to vastly diminish the attorney-client privilege in the business setting."

In correcting that error, the Court of Appeals provided several important clarifications regarding the scope of the *Upjohn* privilege:

- *first*, the Court rejected the lower court's conclusion that *Upjohn* did not apply because KBR's internal investigation had been conducted by in-house counsel without consultation with outside lawyers; as the Court made clear, the general rule is that a lawyer's status as in-house counsel "does not dilute the privilege;"
- *second*, the D.C. Circuit clarified that it did not matter if many of the interviews in KBR's investigation were conducted by non-attorneys, holding that "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege;"
- *third*, the Court also rejected the lower court's attempt to distinguish *Upjohn* on the ground that the employees interviewed by KBR had not been told that the purpose of the interview was to assist the company in obtaining legal advice; as the D.C. Circuit observed in this regard, "nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege in an internal investigation;" and
- *finally*, and perhaps most importantly, the Court of Appeals overturned the lower court's finding that the *Upjohn* privilege did not apply because KBR had conducted its internal investigation in order to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of

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potential wrongdoing. Observing that “the District Court’s novel approach 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,” the Court of Appeals ruled that it is enough to trigger *Upjohn*’s protections if “one of the significant purposes of the internal investigation was to obtain or provide legal advice” and that this is true “regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation.”

The opinion in *Kellogg Brown & Root* thus provides a helpful primer on the “rules of the road” for those conducting internal investigations, but it also affords a timely and important reminder to lower courts and government agencies of the centrality and scope of the corporate attorney-client privilege. As the Court concluded, the privilege “carries costs” but our legal system tolerates those costs because the privilege also encourages full and frank communication between attorneys and their clients and thereby “promotes broader public interests in the observance of law and the administration of justice.”

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