

D.C. Circuit Overturns Lower Court Ruling and Reaffirms the Ability of In-House Counsel to Conduct Internal Investigations

07.01.2014

In a significant decision issued last week reaffirming the importance of the attorney-client privilege in connection with internal investigations, the U.S. Court of Appeals for the D.C. Circuit reversed a lower court ruling that would have considerably hampered the ability of in-house counsel to conduct internal investigations. This decision by the D.C. Circuit reversed a March 2014 order in *United States ex rel. Barko v. Halliburton Co.*, in which the district court had directed defendant Kellogg Brown & Root, Inc. (“KBR”) to turn over documents from its internal investigation into the administration of its military contracts in Iraq. The district court had held that even though the investigation was conducted by KBR’s in-house counsel, the documents were nonetheless not protected by the attorney-client privilege under *Upjohn Co. v. United States* and must be produced to the plaintiff in the False Claims Act action against KBR, in which the plaintiff alleged that KBR had defrauded the government by raising costs and paying kickbacks in relation to its contracts in Iraq.

As a defense contractor, KBR was required by government regulations to maintain a compliance program and investigate allegations of wrongdoing. The district court held that the attorney-client privilege did not apply to the investigation since it was conducted “pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.” The district court distinguished the KBR investigation from the type of internal investigations that are clearly protected under the *Upjohn* decision citing the need for the investigation to be conducted by outside counsel in order to be cloaked with the protections of the attorney-client privilege.

The D.C. Circuit clarified the application and reach of *Upjohn* and its practical application to government contractors such as KBR by rejecting the distinctions cited by the district court and reaffirming that an in-house counsel is fully empowered to engage in privileged communication. These were the critical findings by the Court of Appeals: (i) outside counsel need not be involved for the attorney-client privilege to apply to protect corporate communications with in-house counsel; (ii) interviews conducted by non-attorneys at the direction of in-house counsel are protected by the privilege; and (iii) there are no “magic words” that a company must use with its employees in order to obtain the benefit of the privilege as long as it is a communication made to

Related People:

Geoffrey N. Rosamond
Scott S. Christie
Thomas J. Finn
Paula Cruz Cedillo
James J. Freebery
Zlatko “Zack” Hadzismajlovic
John C. Kelly
Robert A. Mintz

obtain or provide legal advice – even if the employee is not specifically apprised that that is the communication’s purpose.

In another important aspect of this decision, the D.C. Circuit rejected the trial court’s “but for” test and held that in an internal investigation undertaken to comply with legally mandated compliance, investigation, and disclosure obligations, the protection of the attorney-client privilege will be maintained “[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation.” Instead, the D.C. Circuit reaffirmed the “primary purpose” test for determining whether a communication to or from in-house counsel is protected by the privilege and clarified that the test does not require a court to determine whether the provision of legal advice was *the* primary purpose of the communication, but only whether it was *a* primary purpose. The Court wrote that it is “not correct for a court to presume that a communication can have only one primary purpose.” The Court added that this test applies “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 ruling, which is a clear affirmation of the application of the attorney-client privilege to internal investigations, should be of comfort to government contractors and in-house counsel responsible for implementing compliance programs and investigating allegations of wrongdoing. The D.C. Circuit’s decision is an important win for all companies that utilize internal investigations conducted by in-house counsel or outside counsel. At the same time, it is a reminder of the need to take all necessary steps to preserve the privilege, including documenting that a significant purpose of the investigation is to provide legal advice.

The case is *In re: Kellogg Brown & Root, Inc., et al.*, No. 14-5055 (D.C. Cir. June 27, 2014).