

Corporate Litigation:

Attorney-Client Privilege in Internal Investigations

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In one of the most important decisions in recent memory concerning internal investigations, the U.S. Court of Appeals for the D.C. Circuit in *In re Kellogg Brown & Root*,¹ held that communications and materials created during a company's confidential internal investigation are protected by the attorney-client privilege where "one of the significant purposes" of the investigation is to obtain or provide legal advice. Nothing promotes predictable results better than clear definitions. Without reliable assurance that communications between attorney and client are confidential, the candor essential to the relationship is at risk.

In the lower court decision known as *Barko*, a D.C. federal court ruled that reports relating to Kellogg Brown & Root's internal investigation conducted pursuant to regulatory requirements were not protected from disclosure by either the attorney-client privilege or the work product doctrine, generating uncertainty regarding the availability of these protections in internal investigations. Issuing the extraordinary relief of mandamus, the D.C. Circuit rejected as contrary to attorney-client privilege law the restrictive privilege standard enunciated by the district court: The proponent of the privilege needed to establish that "the communications would not have been made 'but for' the fact that legal advice was sought."²

While the application of the attorney-client privilege is necessarily fact-specific, *Kellogg* restores much of the predictability attendant to the availability of the privilege in the business setting; it will likely be the leading decision for some time applying the touchstone principles of corporate attorney-client privilege set forth in the U.S. Supreme Court's *Upjohn Co. v. U.S.*³

'Kellogg'

The documents sought by qui tam plaintiffs in *Kellogg* related to the corporate defendants' investigation conducted pursuant to Department of Defense regulations requiring contractors to maintain internal control systems to facilitate timely discovery and disclosure of improper conduct relating to government contracts. The District Court concluded that the investigation differed from the *Upjohn* paradigm because it was a "routine corporate, and apparently ongoing, compliance investigation required by regulatory law and corporate policy."

In contrast, the D.C. Circuit determined that the privilege assertion in *Kellogg* was "materially indistinguishable" from that in *Upjohn*, where the Supreme Court held that the attorney-client privilege applies in the internal investigation context and reaches confidential communications between an in-house attorney and the company's employees. The *Kellogg* court explained that, as in *Upjohn*, Kellogg Brown & Root (KBR) "initiated an internal investigation to gather facts and ensure compliance with the law after being

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informed of potential misconduct," and "as in *Upjohn*, KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity."

The D.C. Circuit rejected as irrelevant several distinctions drawn by the district court between the facts of *Kellogg* and *Upjohn*. First, the circuit court held that the fact that unlike *Upjohn*, KBR did not involve outside counsel prior to conducting the investigation was inconsequential. While it is often advisable, the involvement of outside counsel is not essential to creation of the attorney-client privilege; a lawyer's in-house status "does not dilute the privilege."

Second, the court held that although, unlike in *Upjohn*, many of the interviews in KBR's investigation were conducted by non-attorneys, the investigation was conducted at the direction of KBR's in-house legal department, and "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."

Third, *Kellogg* rejected *Barko's* distinction that, in contrast to the interviewed employees in *Upjohn*, KBR's interviewed employees were not told that the purpose of their interview was to assist in-house counsel in providing legal advice to the company. According to *Kellogg*, "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." Accordingly, the circuit court held that none of the three distinctions drawn by the district court in *Barko* was a valid basis to deny KBR's privilege claim over the investigation documents at issue.

"More broadly and more importantly," in the court's words, *Kellogg* disagreed with the district court's conclusion that the purpose of KBR's internal investigation was not to obtain or provide legal advice because the investigation "was undertaken to comply with Department of Defense regulations that require defense contractors...to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing." The circuit court rejected the district court's reformulation of the "primary purpose" test as a "but for" test, stating that a but-for standard is "not appropriate for attorney-client privilege analysis." Under this test, communications would not be protected by the attorney-client privilege unless their sole purpose was to seek or provide legal advice. This restrictive approach would withhold privilege protection from communications having both legal and business purposes—communications "that heretofore have been covered by the attorney client privilege."

Moreover, the district court's approach, which the D.C. Circuit said had no legal precedent, would have the radical effect of eliminating the attorney-client privilege for internal investigations conducted by businesses that are legally required to maintain compliance programs—a huge segment of corporate America. The court concluded that "[s]o 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" or company policy.

The court found that "one of the significant purposes" of KBR's internal investigation was to obtain legal advice. Having found that the district court erred in applying the "primary purpose" test, the court engaged in a mandamus analysis, ultimately determining that the district court's error justified granting the extraordinary relief.

Practical Considerations

Kellogg eliminates much of the uncertainty generated by *Barko* regarding the application of the attorney-client privilege in the internal investigations context. In rejecting the "but for" test, the court acknowledged

the importance to attorneys and clients of a clear and pragmatic standard that "does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." The court therefore refined the traditional test, which affords protection "only if the primary or predominate purpose of the attorney-client consultations is to seek legal advice or assistance."⁴

The hunt for "the one primary purpose in cases where a given communication plainly has multiple purposes," the D.C. Circuit concluded, often is impractical and unnecessarily restrictive. Rather, "[s]ensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication." In the context of an internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, under *Kellogg* privilege will apply. That is true 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.

The standard in the U.S. Court of Appeals for the Second Circuit asks whether the predominant purpose of the communication is to render or solicit legal advice. In *In re County of Erie*,⁵ the Second Circuit reaffirmed the "predominant purpose" standard, and took care to clarify that statements in older cases that privilege is limited to communications made to attorneys "solely for the purpose of the corporation seeking legal advice" are not the law. *County of Erie* featured extensive discussion recognizing the multi-purposed nature of many attorney-client communications, and that "the predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another." This pragmatic approach suggests there should be little, if any, variation in privilege determinations based on a slight variation in terminology used by courts.

In addition to toppling *Barko*, *Kellogg* casts substantial doubt on another recent decision from a D.C. district court, *United States v. ISS Marine Services*,⁶ which declined to extend attorney-client privilege to an internal audit report created for a U.S. defense contractor evaluating billing practices of an overseas affiliate. The report was created pursuant to an audit conducted by an internal auditor of the U.S. company under the direction of the Company Secretary and without input of outside counsel. In *ISS Marine*, the court emphasized that outside counsel was not engaged to serve any role in conducting the investigation, though there was a draft engagement letter indicating the outside counsel would "support the investigation for purposes of advising" the company of its legal obligations. In addition, the internal auditor's draft report was marked "confidential," rather than "privileged," and was sent to the company's CEO and Corporate Secretary, and was only finalized and forwarded to outside counsel (among other recipients) after an additional two months of follow-up interviews by the CEO.

Applying the "but for" test, *ISS Marine* concluded that the audit report was created for a business purpose—investigating concerns raised by employees—not to obtain legal advice. Critical to the court's determination was the company's decision not to include counsel in conducting interviews or reviewing documentary evidence, while retaining counsel "in a watered-down capacity to 'consult' on the investigation in order to cloak the investigation with privilege."

The court further noted that the interviewed employees were not told that their responses would be transmitted to counsel for the purpose of securing legal advice and that the defendants made no showing that legal advice resulted from sending the audit report to outside counsel. *Kellogg* rejected the argument that these factors undermine privilege; given that a privilege determination is necessarily fact-and-circumstances dependent, however, it is unclear whether the fact that the audit in *ISS Marine* was not initiated by the company's in-house legal department may foreclose a finding of privilege under those circumstances, even post-*Kellogg*.

The result in *Kellogg* also illustrates some important principles on how the structure and execution of an internal investigation will affect the company's ability subsequently to shield investigation documents from discovery. First, *Kellogg* recognized that during an internal investigation, as in other contexts, communications made to or from non-attorneys acting as agents of counsel are protected to the same extent as communications with counsel. For purposes of the privilege, non-attorneys act as counsel's agent only where their actions are intended to facilitate counsel's provision of legal advice to the company. Accordingly, where non-attorneys conduct employee interviews at counsel's behest, in-house counsel should document their requests of these non-lawyers, as well as the fact that their activities are essential for counsel to be able to provide legal advice to the company.

Second, *Kellogg* enforced the settled principle that the attorney-client privilege does not depend on the involvement of outside counsel. While outside counsel is not essential to application of the privilege, retaining outside counsel very often has manifold benefits, including buttressing a privilege assertion, bringing experience and expertise to a complex problem and heightening the independence of the investigation.

Finally, *Kellogg* rejects the notion that the company must inform interviewed employees of the legal purpose of the investigation, at least where these employees (1) were aware that the company's in-house legal department was conducting a sensitive investigation and that the information they provided would be protected from disclosure, and (2) were told not to discuss the interviews without the general counsel's express authorization. Taking the precautionary measure of informing employees that the purpose of the interviews is to assist counsel in providing the company with legal advice, however, certainly is good practice in order to bolster the assertion of privilege over communications with interviewed employees.

Endnotes:

1. In re *Kellogg Brown & Root*, 2014 WL 2895939, at *3 (D.C. Cir. June 27, 2014).
2. *United States ex rel. Barko v. Halliburton*, 2014 WL 1016784, at *2-*3 (D.D.C. Mar. 6, 2014).
3. 449 U.S. 383 (1981).
4. 1 Paul R. Rice, *Attorney-Client Privilege in the United States* §7:5, at 43-44 (2d ed. 1999), cited in *Visa U.S.A., Inc. v. First Data Corp.*, No. C-02-1786, 2004 WL 1878209, at *3 (N.D. Cal. Aug. 23, 2004).
5. *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007).
6. 905 F.Supp.2d 121, 125 (D.D.C. 2012).

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