

Compliance & Ethics Professional

August
2017



A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

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by Vince Farhat, Nicholas B. Melzer, and Juan M. Rodriguez

Current trends in corporate internal investigations, Part 2: The *Barko/KBR* Decision

- » As discussed in Part 1 of this series, legal advice is protected by the attorney-client privilege; any other type of advice, such as business advice, is not.
- » An internal investigation will likely be privileged if one of the significant purposes of the internal investigation is to obtain or provide legal advice.
- » Under certain circumstances, an internal investigation conducted pursuant to a regulatory requirement or a company's code of business conduct could still be privileged.
- » An internal investigation conducted by a non-attorney is not privileged.
- » Outside Counsel need not conduct an internal investigation for it to be privileged.

Part 1 of this article appeared in the July 2017 issue of Compliance & Ethics Professional.

In *United States ex rel. Barko v. Haliburton (Barko)*, a whistleblower filed a False Claims Act suit alleging that Kellogg Brown & Root (KBR) defrauded the U.S. government by inflating costs and accepting kickbacks while administering military contracts in Iraq.¹ Like with other KBR investigations, the allegations were first transmitted to designated attorneys in KBR's Legal department, who then coordinated and directed the investigation. KBR's Code of Business Conduct required the involvement of certain non-attorney specialists outside of KBR's Legal department, including employees of the Internal Audit function. Because the investigation required in-country work in Iraq, which at the time was an active conflict zone, KBR's Legal department delegated certain investigative work, such as witness

interviews, to non-attorneys. After the interview, interviewers asked interviewees to sign confidentiality agreements, which stated that the investigation was "sensitive" and advised that unauthorized disclosures could have an adverse effect on KBR. Finally, when the non-attorneys completed the investigation, they sent the final interview memorandum to KBR's general counsel.

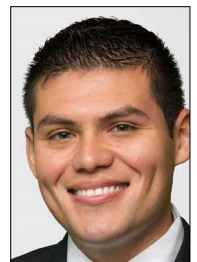
Once the investigation was completed, the *qui tam* plaintiff sought to compel production of the documents resulting from that investigation. The district court ordered KBR to turn over the documents, even though KBR claimed they were privileged. The court found that KBR had waived the attorney-client privilege and



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the attorney work product doctrine, because the internal investigation was conducted “pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.”² The court found that the privilege only applied where the communications would not have been made *but for* the fact that legal advice was sought.

Here, the court reasoned, legal advice was not the *but for* cause of the investigations. The court found instead that the investigation was conducted due to regulatory law, because certain Defense Department regulations required government contractors to implement a compliance program that would “[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts.” The regulations also mandated the company to have a written code of business ethics and “[t]imely reporting to appropriate government official” as well as “[f]ull cooperation with any Government agencies.” Thus, upon finding that KBR’s investigation had “merely implement[ed] the regulatory requirements,” the court ordered disclosure.³

KBR argued that the investigation was indistinguishable from *Upjohn*⁴ and thus the findings should be privileged, but the district court distinguished *Upjohn* on three grounds:

1. In *Upjohn*, in-house lawyers initiated the investigation and conferred with outside counsel, whereas KBR had non-lawyers

conduct the investigation, not consulting with outside counsel;

2. In *Upjohn*, attorneys conducted witness interviews, whereas KBR had non-lawyers conduct the interviews and, thus, interviewees were unable “to infer the legal nature of the inquiry”; and
3. In *Upjohn*, the interviewees were expressly informed that the purpose of the interview

was to obtain information to provide legal advice, whereas KBR never informed the interviewees, whether orally or in the confidentiality agreement, that the purpose of the interview was to obtain information to provide legal advice.

After the district court compelled disclosure of privileged documents

in KBR’s possession, KBR filed a Writ of Mandamus to the U.S. Court of Appeals for the D.C. Circuit.⁵ The U.S. Court of Appeals for the D.C. Circuit issued a Writ of Mandamus vacating the district court’s orders. The appellate court determined that the district court’s “‘but for’ test...[was] not appropriate for attorney-client privilege analysis.” The appellate court stated that the correct test was whether “one of the significant purposes of the internal investigation was to obtain or provide legal advice.” Accordingly, the mere fact that KBR initiated the investigation pursuant to a regulatory requirement and its Code of Business Conduct program was not dispositive. The appellate court found that obtaining legal advice is a significant purpose of an internal investigation, regardless of

KBR argued that the investigation was indistinguishable from *Upjohn* and thus the findings should be privileged, but the district court distinguished *Upjohn* on three grounds...

whether the investigation was undertaken pursuant to a compliance program.

Furthermore, the appellate court rejected the district court's attempts to factually distinguish KBR and *Upjohn*. First, the appellate court found that "*Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply" and that a "lawyer's status as in-house counsel 'does not dilute the privilege.'" Second, non-lawyers can conduct interviews, as well as other activities, so long as counsel oversees the overall investigation, because "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." And lastly, interviewed employees need not be explicitly informed that the purpose of the interview is for the client to obtain legal advice, because "nothing in *Upjohn* requires a company to use magic words to its employees in order to gain

the benefit of the privilege for the internal investigation."

Even in light of the Court of Appeals' decision, *KBR* serves as a warning to those conducting internal investigations. It exemplifies how easily privilege can be waived, whether it be by not giving an employee an *Upjohn* waiver prior to an interview or by having a non-attorney conduct the investigation. It should serve as a reminder that preserving the privilege is of the utmost importance. Accordingly, attorneys should keep in mind the insights provided in Part I when conducting an internal investigation. *

1. *United States ex rel. Barko v. Halliburton Co.*, 37 F. Supp. 3d 1, 3 (D.D.C. 2014).
2. *Id.*
3. *Id.*
4. *Upjohn Co. v. United States*, 449 U.S. 383 (1981)
5. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014).
6. *Id.* at 760.
7. *Id.* at 758.

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