

# Compliance & Ethics Professional

September  
2017



A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

[www.corporatecompliance.org](http://www.corporatecompliance.org)



## Meet Lillian Wylie

Compliance Manager  
Oceaneering International Services Ltd  
Aberdeen, United Kingdom

See page 16

**29**

A road map for starting  
a higher education  
compliance program

Kenneth J. Liddle

**35**

Capturing true value  
in social media  
investigations

Dan Coney

**43**

Board committee  
best practice  
considerations

Sharon Parsley

**47**

Is there benefit  
in being an  
early adopter?

Gwendolyn Lee Hassan

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

# Current trends in corporate internal investigations, Part 3: Notable Decisions Post-KBR

- » While legal advice is protected by the attorney-client privilege, any other type of advice, such as business advice, is not.
- » An engagement letter should explicitly state that the purpose of the engagement is to conduct an investigation and provide legal advice to the client.
- » In order to preserve privilege during an internal investigation, an attorney should always give an Upjohn warning to an employee before beginning an interview.
- » When investigations result in the production of documents to a third party, such as government investigators, counsel should insist on provisions preventing waiver in the case of inadvertent production of privileged materials.
- » Joint defense agreements should explicitly state that confidential communications between outside counsel and the client remain privileged even when discussed with joint defense counsel.

Part 2 appeared in the August 2017 issue of Compliance & Ethics Professional.

Case law following the *KBR* decision further highlights the importance of preserving privilege and best practices to ensure its preservation. The following decisions were selected because (1) they exemplify how following the insights listed above can assist in maintaining privilege, and (2) the cases refer to the appellate decision in *KBR* when discussing applicable law. Notably, two of these cases were decided in jurisdictions outside of the DC Circuit, where the *KBR* decision is not binding. These cases show that courts have found the rationale of *KBR* persuasive and have adopted it.

After the Court of Appeals in *United States ex rel. Barko v. Halliburton Co.*, 74 F. Supp. 3d 183 (D.D.C. 2014) overturned the

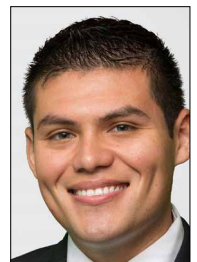
District Court's initial ruling, the court dealt with the issue of whether documents and emails not sent for the purpose of seeking or providing legal advice were privileged solely based on the fact that "KBR attorneys were [] copied on or were added recipients of emails." *Id.* at 188. In holding that the documents and emails were not privileged, the court referred back to its earlier finding that in order for a "communication to be sheltered by the attorney client privilege . . . one of the significant purposes . . . [must be to] obtain[] or provid[e] legal advice." *Id.* Furthermore, the court found that the attorneys were "incidental recipients of communications made for ordinary



Farhat



Melzer



Rodriguez

business purposes.” *Id.* at 189. Moreover, “none of the other employees involved in the communications were acting as agents of attorneys for the purposes of providing legal advice or gathering information to allow the attorneys to provide legal advice.” *Id.* This decision reinforces multiple insights: (1) attorneys should provide their clients with only legal advice to prevent a court from finding that the attorney provided non-privileged business advice, (2) non-attorneys should not be involved in internal investigations unless it is expressly memorialized that they are acting as an agent of the attorney, and (3) routing every document through your attorney does not make the document privileged if it was not intended to assist in providing legal advice. In other words, nothing is gained by making an attorney an incidental recipient.

In *In re: General Motors LLC Ignition Switch Litigation*, the court considered the issue of whether the attorney-client privilege applies to counsel’s communications with former employees. *In re: Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015), the court found that the attorney-client privilege could apply if certain requirements were met. First, the court found that the scope of the conversation between counsel and the former employees had to “relate[] to the former employee’s conduct and knowledge gained during employment.” *Id.* at 527. Second, the information sought must be needed to assist counsel in providing legal advice to the client. *Id.* at 527-28. And third, the court required that the interviewed employees be “sufficient[ly] aware” of the legal purpose of the interview[] and the confidentiality attached to their communications.” *Id.* at 527. The court found that all of the requirements were met and thus documents relating to interviews were privileged. *Id.* at 531. This decision

reinforces multiple insights: (1) the scope of an interview with a former employee should be limited, (2) that it is essential that an attorney’s purpose in gathering information be to provide the client with legal advice, and (3) the interviewee must be aware of the legal purpose of the interview and an *Upjohn* waiver must be given. Failure to do any of the aforementioned could lead to an attorney having to turn over information that should have been privileged.

In *Wultz v. Bank of China Limited*, the court tackled the issue of whether findings of an internal investigation conducted by non-attorneys were privileged. *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384 (S.D.N.Y. 2015). In 2008, Plaintiffs sent a letter to Bank of China (BOC) informing BOC that BOC had assisted a terrorist group by executing dozens of wire transfers. *Id.* at 387. Plaintiffs demanded BOC enter into settlement negotiations or face litigation. *Id.* BOC had Wang Qi, the General Manager of BOC’s Legal Compliance department, and Geng Wei, BOC’s Chief Compliance Officer, conduct an internal investigation to determine the validity of the allegations. *Id.* Neither Qi nor Wei were attorneys. *Id.* A parallel investigation was conducted by BOC affiliate BOC-NY. *Id.* John Beauchemin, a non-attorney, led BOC-NY’s internal investigation. *Id.* Qi, Wei, and Beauchemin all gathered information with the “expectation” that it would be used by external counsel in assessing the merits of the allegations and developing a legal strategy. *Id.* at 388. BOC provided no evidence that counsel “directed or was otherwise consulted for legal advice regarding the investigation during this time period.” *Id.* Eventually, BOC did retain counsel, although BOC did not allege that “any of the investigatory actions were done at [his] direction.” *Id.* at 389. BOC argued that any documents related to the internal investigation were privileged

because the investigation was conducted with the expectation that legal counsel would use it to provide legal advice. *Id.* at 391. The court found that the documents were not privileged. *Id.* at 393. The court’s rationale was that (1) case law does not protect the collection of information merely because the “person harbors a plan to provide the information [] to an attorney”; (2) the investigation was not conducted at the direction of counsel for the purpose of obtaining legal advice; and (3) the internal investigation was conducted by non-attorneys, and thus it cannot be argued that the purpose of information collection was to provide legal advice. *Id.* at 391-92. The *Wultz* decision emphasizes several points: (1) counsel must do the fact gathering or direct an agent to do the fact gathering, and the purpose of gathering facts must be to render legal advice; (2) a compliance department staffed by non-lawyers will not automatically give rise to privileged internal investigations; and (3) it is necessary to contact an attorney, whether in-house or outside counsel, before launching an internal investigation.

Lastly, in *Harrington v. Freedom of Info. Comm’n*, 323 Conn. 1 (2016), the Connecticut Supreme Court tackled the issue of whether email communications between the Connecticut Resources Recovery Authority and attorneys, who were lobbyists hired by the Authority to provide consulting services under liaison agreements fell within the attorney-client privilege. Petitioner contended that “the evidence demonstrate[d] that [the attorneys] . . . provid[ed] business advice, legislative advice, or lobbying services, to which the privilege does not apply” and that “legal advice must be the predominant or primary purpose of the communications for them to be privileged.” *Id.* at 11. The court agreed that communication must explicitly or

implicitly seek specific legal advice to be subject to the privilege and remanded the case for further consideration. *Id.* at 22. The court also noted that there was a “broad consensus in other jurisdictions that, ‘if the non-legal aspects of the consultation are integral to the legal assistance given and the legal assistance is the *primary purpose* of the consultation, both the client’s communications and the lawyer’s advice and assistance that reveals the substance of those communications will be afforded the protection of the privilege.’” *Id.* at 17-18 (emphasis in original). In a footnote, the court noted that the *KBR* decision applied the standard of “whether obtaining or providing legal advice was *one of the significant purposes* of the attorney-client communication,” but declined to apply that standard. *Id.* at 17-18 n.7 (emphasis added). This case serves as a reminder that different jurisdictions may have different standards, and counsel should be familiar with the applicable standard in every jurisdiction in which they practice. Moreover, it also serves as a reminder that *only* legal advice is protected by the attorney-client privilege.

### Final takeaways

Before conducting an internal investigation, a company must proceed with caution due to the numerous pitfalls that can lead to the waiver of privilege. Clients and attorneys should keep in mind the insights listed in Part I when considering internal investigations. However, it should be noted that the insights listed are not exhaustive and merely provide a good starting point to preventing waiver of privilege when conducting internal investigations. \*

*Vince Farhat* ([vince.farhat@hkllaw.com](mailto:vince.farhat@hkllaw.com)) and *Nicholas B. Melzer* ([nicholas.melzer@hkllaw.com](mailto:nicholas.melzer@hkllaw.com)) are Partners at Holland & Knight in Los Angeles. *Juan M. Rodriguez* ([juan.rodriguez@hkllaw.com](mailto:juan.rodriguez@hkllaw.com)) is an Associate at Holland & Knight in Los Angeles.