D.C. Circuit Grants Mandamus To Protect In-House Internal Investigation Materials

By David Greenwald

In *In re: Kellogg Brown & Root, Inc.*, No. 1:05-cv-1276 (D.C. Cir. June 27, 2014), a panel of the United States Court of Appeals for the District of Columbia Circuit granted a petition for a writ of mandamus, finding that the district court's privilege ruling was clearly erroneous when it held that internal investigation materials were not privileged, but were instead prepared for a business purpose where the investigation was conducted pursuant to the company's compliance program.

In a *qui tam* case brought against defense contractor KBR, the Relator sought discovery of materials created during KBR's internal fraud investigation. The investigation was conducted pursuant to KBR's Code of Business Conduct (CBC), which includes a compliance program required by federal regulations for defense contractors. The investigation was conducted at the direction of the Law Department and employee interviews were conducted by non-lawyers at the direction of in-house counsel. The trial court ruled that the investigation materials were not privileged on several grounds: (1) the investigation did involve outside counsel; (2) the interviews were not conducted by lawyers; (3) employees were not informed expressly that the purpose of the interviews was for a legal purpose; and (4) the "primary purpose" of the investigation was business related, because the investigation would have been conducted pursuant to the CBC whether or not KBR sought legal advice.

Citing the United States Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) throughout its opinion, the appellate court granted KBR's petition for a writ of mandamus, broadly holding that internal investigations conducted at the direction of in-house or outside counsel are within the privilege. First, the general rule established by *Upjohn* is that a lawyer's status as in-house counsel does not "dilute" the privilege, so long as counsel is acting in a legal capacity. Second, non-lawyers who conduct interviews at the direction of counsel act as the agents of counsel and such interviews are "routinely protected by the attorney-client privilege." Third, the *Upjohn* decision does not require " a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation." Fourth, the trial court erred in applying a "but for" analysis to determine whether the "primary purpose" of the investigation was legal in nature rather than for a business purpose. Under the trial court's approach, privilege would apply only where the "sole purpose" of an investigation was to obtain legal advice, thereby "eradicating" the attorney-client privilege for internal investigation 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 appellate court articulated what it deemed to be the proper "primary purpose" test: "Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication?" (emphasis in original) "In the context of an organization's internal investigation, if one of the significant purposes . . . was to obtain or provide legal advice, the privilege will apply." The appellate court concluded its opinion by emphasizing that the privilege protects communications, but it does not protect against disclosure of the underlying facts.

CONTACT US

David Greenwald, Partner, Jenner & Block

Phone: 312 923-2774 Email: dgreenwald@jenner.com Download V-Card

Practice Groups: Litigation, Bankruptcy, Workout and Corporate Reorganization, Insurance Recovery and Counseling, International Arbitration, Reinsurance