

D.C. District Court Order Provides A Warning About Attorney-Client Privilege Protection For Internal Investigations

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A decision earlier this month out of the United States District Court for the District of Columbia serves as a warning that the mere involvement of in-house counsel may not be enough to give attorney-client privilege protection to an internal investigation. In [United States ex rel. Barko v. Halliburton Co.](#), Cause No. 05-01276 (D.D.C. Mar. 6, 2014), defense contractor Kellogg, Brown and Root, Inc. ("KBR") was ordered to produce materials from internal investigations conducted pursuant to its Code of Business Conduct ("COBC"). Because those investigations were conducted to comply with "regulatory law and corporate policy," the court reasoned, the materials are not privileged. *Barko* is a qui tam action brought by a former employee of KBR who alleged that KBR procurement procedures had inflated costs at three US military bases in Iraq. KBR had investigated tips about such potential procurement irregularities several years before Barko filed his lawsuit. According to KBR's briefing on the issue, the investigations of those tips were coordinated and managed by the Vice President of Legal for Infrastructure, Government and Power. Security investigators, working under the Law Department, conducted the interviews and submitted final reports to the Vice President, who with the COBC Director (another lawyer) determined whether a violation had been substantiated. If the answer was yes, the two attorneys would notify senior management and advise on further action. Despite the role of counsel in the investigations, the District Court determined that KBR had failed to establish that the investigation materials were privileged. The court reasoned that a communication is privileged only if its "primary" purpose is to secure a legal opinion, legal services or assistance in some legal proceeding. To establish that a purpose was "primary", the court went on, the party must show that "the communication would not have been made 'but for' the fact that legal advice was sought." The court noted that the Department of Defense contracting regulations required KBR and other defense contractors to have internal control systems such as the COBC. The court viewed the COBC as "merely implement[ing] these regulatory requirements." Because the investigations were required by both regulatory law and corporate policy, the court held, KBR could not satisfy the "but for" test; the investigations would have been conducted regardless of whether legal advice was sought. This type of analysis is particularly worrying in light of the government's increasing focus on the adequacy of a company's compliance program in charging decisions. For example, the [SEC's and Department of Justice's Resource Guide to the U.S. Foreign Corrupt Practices Act](#) makes clear that, for an FCPA compliance program to be considered adequate, it should include an "efficient, reliable, and properly

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funded process" for investigating allegations of misconduct. So companies are left in a trick bag -- they can implement investigation procedures so as to minimize the risk of government enforcement actions but in doing so they may be unable to establish that any investigation report or other materials were primarily for the purpose of seeking legal advice. The *Barko* decision did, however, give some hints as to what a company might be able to do to bolster any claim of privilege. First, the court viewed as significant the fact that employees who were interviewed were not told that the purpose of the investigation was to obtain legal advice. The court considered that as a fact that bolstered the claim that the investigation's purpose was business, not legal. Any interview in an internal investigation should begin with a "Corporate Miranda" or "Upjohn" warning that includes the statement that the purpose of the interview is to provide legal advice to the corporation. Second, the court contrasted the KBR investigations with the investigation at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which the Supreme Court held that materials from an internal investigation were privileged. The KBR investigations were part of an ongoing compliance process. "In contrast, the Upjohn internal investigation was conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation." The *Barko* decision is currently before the DC Circuit on a writ of mandamus, so its validity may be short-lived. But even if the DC Circuit reverses, the decision is a good reminder that conducting internal investigations without the advice of outside counsel can result in unintended consequences.