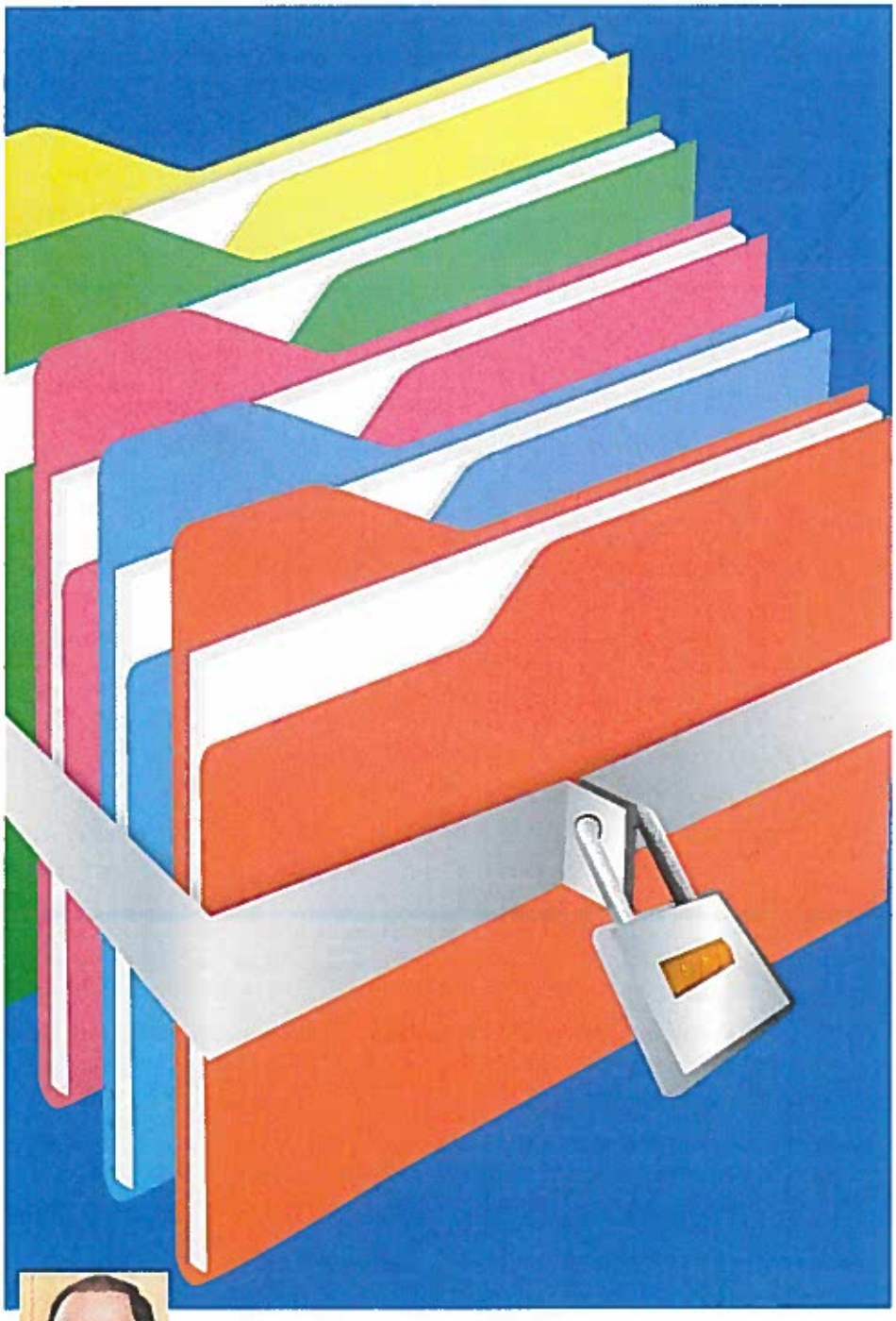
Attorney-Client Privilege

By Lawrence S. Ebner

Protecting Privileged Internal Investigation Communications



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Imagine this: An attorney representing homeowners who reside across a narrow river from one of your company's manufacturing plants writes to your CEO. She claims that the factory's night crew routinely dumps hazardous waste into the river (which forms the border between two states). She also claims that the waste has contaminated the homeowners' property and made them ill. Your CEO requests that you, as general counsel, implement corporate environmental policies by conducting an internal investigation. The specific objectives of the investigation are to ascertain the facts, and to determine whether any federal or state environmental laws have been violated and/or whether mandatory reporting requirements might apply. This will enable you to advise the CEO and the Board of Directors on what actions to take.

Because your legal budget is tight, you decide to avoid the expense of engaging an outside attorney. Instead, you send an email to the factory manager requesting him to interview individual members of the night crew, review security camera videos, and inspect the back lot and river bed for possible evidence of illegal dumping. Your email explains that the purpose of the factory manager's employee interviews and related investigation is to help the company obtain, or to help you provide, legal advice. The email, however, does not instruct the manager to explain the purpose of the interviews to the employees, and he does not do so.

Your email also requests that the factory manager prepare a written report summarizing his employee interviews and findings. He is to send the report to you within fourteen days along with his employee interview notes. After reviewing the report, which you have directed the factory man-

ager not to discuss with anyone outside of the company, you prepare a confidential memorandum. Your memorandum, which refers to certain statements made by the interviewed employees, advises the CEO of the facts and recommends a course of action to ensure regulatory compliance and protect the company's legal interests.

One year later, the homeowners file a multi-million dollar damages suit against your company. You now hire outside defense counsel, who promptly removes the suit to federal district court on diversity grounds. During discovery, the plaintiffs request production of any and all documents relating to any internal investigation that may have been conducted prior to commencement of the suit. Your defense counsel provides plaintiffs with a privilege log that lists the factory manager's report and interview notes and your memorandum to the CEO, and she declines to produce those documents on the ground of attorney-client privilege. The plaintiffs file a motion to compel, which the trial court grants following a heated hearing. The district court promptly denies your request to certify the ruling under 28 U.S.C. §1292(b) for interlocutory appeal.

What, if anything, can you do now? Your next step very well may be to file a petition for writ of mandamus requesting a federal court of appeals to uphold the attorney-client privilege by vacating the district court's document production order. *See In re Kellogg Brown & Root, Inc.* ("*KBR*"), 756 F.3d 754 (D.C. Cir. 2014), *pet. for reh'g denied*, Sept. 2, 2014.

Attorney-Client Privilege Applies to Internal Investigations

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* To foster candid communication, the privilege runs both ways: It "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. In other words, "the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *In re KBR*, 756 F.3d at 757 (citing 1 Restatement (Third) of the Law Governing Lawyers §§69–72 (2000)); *see also* Fed. R. Evid. 501 ("The common law—as interpreted by United States courts in light of reason and experience—governs a claim of privilege....").

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The Supreme Court held in *Upjohn* that the attorney-client privilege applies to corporations—more specifically, to communications between employees and in-house counsel, or their representatives, when conducting an internal investigation to assess corporate compliance with legal requirements. *Upjohn* involved judicial enforcement of an IRS summons for documents relating to an internal investigation that the company's chairman requested his general counsel to conduct regarding questionable payments made to foreign governments. The Court held that the attorney-client privilege applied to the detailed questionnaire responses and employee interview notes that were generated during the course of the investigation.

"The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel." *Upjohn*, 449 U.S. at 394. The Court explained that the narrow scope that the lower court had afforded the attorney-client privilege in the corporate context "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* at 393. The Court noted, however, that the "privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Id.* at 395. (The Government conceded in *Upjohn*, however, that the work-product doctrine would apply to the documents covered by the IRS summons to the extent the attorney-client privilege did not. *See id.* at 397.)

In a concurring opinion, Chief Justice Burger would have taken *Upjohn* one step further by "articulat[ing] a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts." *Id.* at 403 (Burger, J., concurring in part and concurring in the judgment). According to Chief Justice Burger, that standard would be that "as a general rule, a communication is privileged when... an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct with the scope of employment." *Id.* at 402–03. Although the majority opinion does not incorporate that standard, in-house counsel have been relying upon *Upjohn* for almost 35 years to protect internal investigation communications.

D.C. Circuit Adheres to *Upjohn*

The D.C. Circuit's recent opinion in *KBR* reaffirms *Upjohn's* continuing vitality and rejects any narrowing of that case's appli-

cability. In *KBR*, a defense contractor's former employee filed a False Claims Act *qui tam* action alleging that the company had defrauded the federal government. During discovery, the *qui tam* relator sought documents relating to the company's prior internal investigation of the alleged fraud. That investigation had been conducted under the company's Code of Business Conduct and overseen by its law department. After reviewing the documents *in camera*, a D.C. federal district court ruled that the attorney-client privilege did not apply, in part because the investigation had been undertaken pursuant to regulatory law and corporate policy, rather than solely for the purpose of obtaining legal advice. The district court refused to stay its order compelling production or to certify it for interlocutory appeal.

The company filed a petition for writ of mandamus under Fed. R. App. P. 21 and 28 U.S.C. §1651. The court of appeals stayed the district court's document production order pending its ruling on the mandamus petition. Following a hearing, a D.C. Circuit panel (Circuit Judges Griffith, Kavanaugh, and Srinivasan) held that the district court's decision "is irreconcilable with *Upjohn*." *KBR*, 756 F.3d at 756. The court granted the petition and vacated the district court's order. Citing *Upjohn*, the court reiterated that "the attorney-client privilege covers only communications and not facts," but held that the relator "was not entitled to KBR's own investigation files." *Id.* at 764.

The D.C. Circuit specifically rejected each ground on which the district court had attempted to distinguish *Upjohn*. *First*, the court of appeals indicated that an in-house attorney does not need to confer with outside counsel in order for the attorney-client privilege to apply to communications attendant to an internal investigation. *See id.* at 758 ("*Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply.").

Second, the court of appeals explained that as long as an internal investigation "was conducted at the direction of the attorneys" in a company's law department, the privilege applies even if employee interviews are conducted by non-attorneys. *Id.* The court noted that "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." *Id.*

Third, the court stated that it was not necessary to expressly inform employees that they are being interviewed for the specific purpose of assisting the company in obtaining legal advice. According to the court, "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." *Id.* Nevertheless, the prudent course of action is to inform employees in writing that they are being interviewed to help the company obtain legal advice.

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More broadly, the D.C. Circuit held 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 other purposes* for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." *Id.* at 758–59 (emphasis added). In holding that the district court "applied the wrong legal test and clearly erred," the court of appeals repudiated the lower court's holding that the "primary purpose" of a communication is to obtain legal advice only if it would not have been made "but for" the fact that legal advice was sought. *Id.* The court of appeals held that this "but for" approach—requiring a communication's *sole* purpose to be for obtaining or providing legal advice—"would eliminate the attorney-client privilege for numerous communications that are made both for legal and business purposes." *Id.* at 759, 760. More specifically, the court explained that such a "novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry." *Id.* Recognizing that an internal investigation can have more than one objective (*e.g.*, ensuring regulatory compliance as well as facilitating legal advice), the court of appeals held that "if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply." *Id.* at 760.

Using Mandamus to Protect Attorney-Client Privilege

The *KBR* case came to the D.C. Circuit by means of a petition for writ of mandamus. Seeking mandamus is a method of appeal that in-house counsel should consider pursuing if a trial court clearly errs by ordering production of attorney-client privileged documents.

When a federal district judge issues an important interlocutory ruling, the options for immediate appeal are limited. Most lawyers first think of requesting certification under 28 U.S.C. §1292(b), but certification is within the trial court's discretion, and as a practical matter, certification requests are usually denied. For example, it may be difficult to demonstrate that a trial court's discovery order "involves a controlling question of law as to which there is substantial ground for difference of opinion," or that immediate appeal of the order "may materially advance the ultimate termination of the litigation." *Id.* Further, even when an interlocutory order is certified, the court of appeals has to agree to hear the appeal. *See* Fed. R. App. P. 5 (Appeal by Permission).

A "collateral order" appeal is another option for certain types of interlocutory rulings—orders that (i) conclusively determine a disputed question of law, (ii) resolve

an important issue that is completely separate from the merits of the case, and (iii) would be effectively unreviewable on appeal from a final judgment. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But various categories of interlocutory rulings—including rulings involving application of the attorney-client privilege—do not qualify for collateral order appeal. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-13 (2009).

That leaves mandamus, the most drastic method for challenging a federal district court's interlocutory ruling. Many lawyers view filing a petition for a writ of mandamus under Fed. R. App. P. 21 to be a daunting, no-win situation. They are reluctant to seek mandamus out of fear of alienating (or further alienating) the trial judge, who presumably will continue to preside over the suit.

The D.C. Circuit's *KBR* decision demonstrates, however, that mandamus can be used successfully to challenge interlocutory rulings—including rulings rejecting assertion of the attorney-client privilege—that meet the stringent criteria set forth in *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004). Under *Cheney*, the following three conditions must be met: (i) the mandamus petitioner must have no other adequate means for attaining the desired relief; (ii) the mandamus petitioner must show that its right to mandamus is clear and indisputable; and (iii) the court of appeals, in the exercise of its discretion, must be satisfied that mandamus is appropriate under the circumstances. *Id.* at 380–81 (citing *Kerr v. U.S. District Court for the Northern District of California*, 426 U.S. 394, 403 (1976)).

In *KBR*, the court of appeals found that each of these three factors applied. The court explained that "the first condition for mandamus—no other adequate means to obtain relief—will often be satisfied in attorney-client privilege cases." *KBR*, 756 F.3d at 761. This is because "appeal after final judgment will often come too late because the privileged materials already will have been released." *Id.* The court indicated that the *KBR* case satisfied the second, "rarely met," *Cheney* factor—demonstrating that the right to mandamus is "clear and indisputable"—because the district court's privilege ruling was not merely faulty, but instead, constituted "a clear legal error." *Id.* at 762.

Further, the court of appeals indicated that because it was "satisfied that the writ is appropriate under the circumstances," the *KBR* case also satisfied the third *Cheney* factor. *Id.* Observing that this "is a relatively broad and amorphous totality of circumstances consideration," the court recognized that the district court's privilege ruling "would have potentially far-reaching consequences" since it might "upend certain settled understandings and practices" concerning the conduct of internal investigations. *Id.*

In-house counsel should continue to conduct or oversee internal investigations with the understanding and expectation that unless waived, the attorney-client privilege will protect internal investigation-related communications.

Role of *Amici Curiae*

In finding that the third factor warranting mandamus applied, the D.C. Circuit relied in part on an *amicus curiae* brief submitted by the Chamber of Commerce of the United States and other business organizations. The *amicus* brief argued that the district court's ruling might "work a sea change in the well-settled rules governing internal corporate investigations." *Id.* The court indicated that although the district court's ruling does not have precedential effect, the *amicus* brief "which was joined by numerous business and trade associations, convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning." *Id.* at 763. Because "uncertainty matters in the privilege context," the court of appeals found that the third *Cheney* factor was met. *Id.*

The weight that the court gave to the industry *amicus* brief underscores the increasingly important role that amici curiae play in providing information that helps appellate courts resolve appeals. *See generally*, Lawrence S. Ebner, *Amicus Brief FAQs, In-House Defense Quarterly* (Summer 2013); Lawrence S. Ebner and Robin S. Conrad, *In-House Litigation Managers Need to 'Think Amicus,'* Appellate Law 360 (June 10, 2014) (text available at http://www.mckennalong.com/news-listing-4487.html). DRI—The Voice of the Defense Bar, through its Amicus Committee, plays a very active role in U.S. Supreme Court and other appeals, presenting issues of broad importance to the civil litigation defense bar and its clients.

Take-Aways for In-House Counsel

In-house counsel should continue to conduct or oversee internal investigations with the understanding and expectation that unless waived, the attorney-client privilege will protect internal investigation-related communications. Under the *KBR* case, this is so even if the internal investigation is required by federal or state law, or conducted to ensure regulatory compliance, as well as to facilitate obtaining or providing legal advice.

Options for interlocutory appeal should be evaluated if a trial court declines to enforce properly preserved attorney-client privilege in connection with documents that represent, contain, or discuss internal investigation communications. When in federal court, filing a petition for writ of mandamus under Fed. R. App. P. 21 (and any corresponding circuit rules) should be considered. Entitlement to mandamus is not assured; it depends upon whether the district court has committed clear error in rejecting the assertion of privilege, and whether mandamus is appropriate under the circumstances. In arguing that mandamus is both appropriate and necessary, the potential far-reaching implications of the district court's ruling should be emphasized, possibly with the support of *amici curiae*.