By Lawrence S. Ebner and Christopher W. Myers

Tips for Conducting Attorney–Client Privileged Internal Investigations

The turn of the 21st century was marked by several high-profile corporate scandals, including Enron, WorldCom, and Tyco. One of the ways in which regulators (over)reacted to these scandals was to implement new requirements for companies to self-investigate potential instances of their own wrongdoing and self-report possible violations. For example, defense contractors now are required to investigate and disclose a broad range of potential civil or criminal infractions ranging from violation of the federal False Claims Act, to cybersecurity breaches, to receipt of a counterfeit part from a supplier. In addition to government-required internal investigations, the vast majority of companies want to be responsible corporate citizens by investigating a wide variety of complaints involving issues such as sexual harassment, product hazards or defects, and environmental releases.

Not surprisingly, as the number of internal investigations has increased, so too have attempts by both the federal government and private parties to access documents and communications generated in connection with internal corporate investigations. Since the Supreme Court's landmark decision in *Upjohn*, it has been well-established that this type of information is protected by the attorney–client privilege so long as the investigation was conducted by legal counsel in order to provide legal advice to the company. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Recent judicial decisions have threatened to undermine this privilege afforded internal investigation documents. These decisions serve as a caution to all in-house counsel to ensure that their organizations have adequate processes and procedures in place to ensure that communications generated during the conduct of an internal investigation remain privileged. This article provides a brief background of the attorney–client privilege as applied to corporate internal investigations, describes recent cases interpreting this privilege, and outlines best practices that all companies should adopt to provide the greatest possible protection to privileged internal investigation documents.

The Attorney–Client Privilege in Internal Investigations

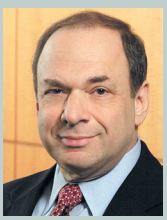
The attorney–client privilege "applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.* ("*In re KBR*"), 756 F.3d 754, 757 (D.C. Cir. 2014) (citing 1 Restatement (Third) of the Law Governing Lawyers §§69–72 (2000)); *see also* Fed. R. Evid. 501 ("[t]he common law—as interpreted by United States courts in light of reason and experience—governs a claim of privilege…").

Prior to the Supreme Court's decision in *Upjohn*, the applicability of the attorney–client privilege in the corporate context was unsettled, with some courts holding that the privilege applies only to communications between an attorney and a core "control group" of employees who are "in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney…." *Upjohn*, 449 U.S. at 390. This meant, for example, that an interview conducted by an attorney with an employee outside this "control group" potentially was not privileged, even if the interview was conducted in connection with an investigation that the attorney was conducting in response to a management request for legal advice. *See id.*

The Supreme Court in *Upjohn* found that this "control group" test ignored the fact that the attorney–client privilege protects not only legal advice dispensed by a lawyer to the client, but also the lawyer's gathering of information necessary to formulate that legal advice. *Id.* Consequently, the Supreme Court confirmed that the attorney–client privilege applies to corporations and, 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.

The Supreme Court's holding in *Upjohn* was premised on several findings that are key for in-house counsel to understand in order to ensure that the privilege attaches to an internal investigation:

1. The communications at issue were made by employees to counsel at the direction of corporate management in order to secure legal advice from counsel;
2. The subject information was not available from upper management and was needed by corporate counsel to formulate legal advice;
3. The communications concerned matters within the scope of the employees' corporate duties;
4. The employees were aware that the reason for communicating with counsel



■ Lawrence S. Ebner, an appellate litigation partner at Dentons US LLP in Washington, D.C., focuses on federal issues. He serves as vice chair of the DRI Amicus Committee and publications chair of the DRI Appellate Advocacy Committee. Christopher W. Myers, a government contracts partner at Dentons US LLP in Denver, Colorado, focuses on internal investigations and fraud litigation.

was to allow the corporation to obtain legal advice; and
5. The employees were directed to keep the communications confidential, and the information was, in fact, kept confidential.

Upjohn, 449 U.S. at 394–95. For over 30 years, these elements have served as a reliable guide for in-house and outside counsel to ensure that communications in connection with an internal investigation remain privileged.

The *Barko* Saga

Twice in 14 months, the U.S. Court of Appeals for the D.C. Circuit had to intercede to prevent a federal district court from requiring disclosure of internal investigation documents that are clearly privileged under the *Upjohn* standard. On November 5, 2015, the relators in this case filed a petition for a writ of certiorari from the U.S. Supreme Court, requesting the Supreme Court to reverse the D.C. Circuit. While the Supreme Court previously denied a similar petition from these same relators and will likely deny certiorari again, the district court's vacated decisions provide a roadmap for adversaries, and potentially judges, looking to expose internal investigation documents.

First, in March 2014, the U.S. District Court for the District of Columbia issued an order directing a defense contractor defendant in a False Claims Act *qui tam* suit to turn over in discovery an internal investigation report and related documents, holding that the attorney–client privilege did not protect the documents from disclosure. *United States ex rel. Barko v. Halliburton Co.,* 37 F. Supp. 3d 1 (D.D.C. 2014). The defendant (KBR, a former Halliburton subsidiary) conducted the investigation at issue pursuant to its contractual obligation under a mandatory government contract procurement disclosure rule to investigate and report credible evidence of potential False Claims Act violations. *Id.* at 5.

The district court applied a "but for" test to the attorney–client privilege, finding that the privilege only applies if obtaining legal advice was the sole reason that the communications occurred. *Id.* Based on this finding, the district court concluded that the investigation "would have been conducted regardless of whether legal advice was sought" pursuant to KBR's contractual requirement under the Federal Acquisition Regulation mandatory disclosure rule. *Id.* Thus, the district court concluded that the documents at issue were not privileged. *Id.*

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KBR filed a petition for writ of mandamus, which the D.C. Circuit granted in *In re KBR*, 756 F.3d 754. *See* Lawrence S. Ebner, *Protecting Privileged Internal Investigation Communications*, In-House Defense Quarterly (Fall 2014). The D.C. Circuit held that, among other legal errors, the District Court's "but for" test was not appropriate because there is no legal requirement that obtaining legal advice must be the sole purpose for communicating with counsel. *Kellogg Brown & Root*, 756 F.3d at 759. Communications can, and often do, have dual purposes, such as: (1) obtaining legal advice, and (2) complying with regulatory requirements. *Id.* Thus, "[i]n the context of an organization's internal investigations, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply." *Id.* at 760. The D.C. Circuit stressed that the district court's "but for" test would eliminate the attorney–client privilege for numerous communications previously protected and would leave internal investigations conducted by businesses pursuant to applicable laws and regulations unprotected. *Id.* The D.C. Circuit vacated the district court ruling and remanded the case to the district court for further proceedings.

Undeterred, the same district court again compelled disclosure of KBR's investigation documents, this time holding that KBR had impliedly waived the attorney–client privilege (and work-product doctrine). *United States ex rel. Barko v. Halliburton Co.*, 74 F. Supp. 3d 183 (D.D.C. 2014). Specifically, the district court held that KBR waived the privilege because KBR put the documents at issue in the case by: (1) soliciting questions in KBR's own Rule 30(b)(6) deposition about the contents of the investigation reports, and (2) relying on the Rule 30(b)(6) witness' testimony regarding the investigation reports in a motion for summary judgment. *Id.* at 187.

In yet another decision, the district court held that even if KBR had not waived the privilege, reports drafted by KBR investigators were not protected by the attorney–client privilege to the extent they did not reveal confidential employee communications, but instead contained only "fact work product." *United States ex re. Barko v. Halliburton Co.*, 75 F. Supp. 3d 532 (D.D.C. 2014). Thus, because according to the district court, the reports primarily contained "raw factual contract background material for KBR's legal department," and not any strategy, opinions, or conclusions related to those facts, this information was discoverable if the opposing party could show "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.*

KBR again filed a petition for writ of mandamus, and on August 11, 2015, the D.C. Circuit again issued a writ of mandamus vacating the document production order. *See In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015). This time, the D.C. Circuit held that the district court erred by finding an at issue waiver based on the Rule 30(b)(6) deposition. *Id.* at 150. The D.C. Circuit further held that the district court's finding that the documents at issue contained only "fact work product" was wrong, as the documents clearly contained privileged "mental impressions." *Id.* at 148.

Importantly, the D.C. Circuit explained that "[i]f allowed to stand, the District Court's rulings would ring alarm bells in corporate general counsel's offices

throughout the country about what kinds of descriptions of investigatory and disclosure practices could be used by an adversary to defeat all claims of privilege and protection of an internal investigation." *Id.* at 151. Thus, in the end, the D.C. Circuit reaffirmed the long-standing *Upjohn* standard for the application of attorney–client privilege to internal investigations.

Best Practices for Maintaining Privilege

While the District Court's decisions in the *Barko qui tam* suit ultimately were vacated, there is little doubt that opposing parties will use the district court's reasoning as a means to try and pry into the privileged communications generated during an internal investigation. It is thus more important than ever for companies to ensure that they have implemented best practices that provide the greatest possible protections for documents generated in connection with an investigation. Below are key steps every company should take immediately to maximize their ability to sustain the privileged and confidential status of such information:

1. Review and, if appropriate, consider revisions to policies and procedures to clearly indicate that it is company policy for the legal department to conduct internal investigations as part of the legal department's ongoing responsibility to provide legal advice to corporate management.
2. Implement an intake and screening process for issues subject to investigation that includes, at the earliest stages, a process for off-ramping significant and/or non-routine matters for immediate referral to the legal department. Assign this responsibility to someone within corporate compliance or the legal department with adequate seniority to make this determination.
3. For matters routed to the legal department for investigation, implement a process whereby corporate management issues a clear memorandum, commonly known as an *Upjohn* memo, to the legal department (and from the legal department to compliance officers), formally requesting legal advice with regard to the specific issue(s) under investigation, and directing that a legal investigation be conducted.
4. Legal counsel, whether in-house or outside, should supervise the entire investigation process for investigations where privilege is required. This means they should not only direct and supervise the process, but should be present during, and actually conduct, all interviews and other fact-finding efforts.
5. Provide adequate admonitions to all employee interviewees, notifying them that the purpose of the discussion is to solicit information to be used directly for the purposes of providing requested legal advice to corporate management. This may be confirmed in writing with signed confidentiality statements, if warranted.
6. Legal counsel, whether in-house or outside counsel, should draft all interview memoranda, investigation reports and other work product generated during the investigation. The introductory paragraphs of all such memoranda, reports, and other relevant documentation should clearly indicate that their purpose is to gather and analyze information for purposes of providing requested legal advice to management. Such memoranda and reports should be written in such a way that they reflect the mental impressions of counsel, and not merely a verbatim recitation of facts.
7. Documentation connected to investigations should always be properly marked with protective "Attorney–Client Privilege" legends to guard against unintentional provision of such documents. To the extent any such information is ultimately provided to a third-party, these markings should be removed to avoid the appearance of a subject matter waiver.

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Conclusion

Candid exchange of information between employees and legal counsel is a critical aspect of any effective internal investigation. The attorney–client privilege helps to ensure that legal counsel can obtain the information needed to provide effective counsel to corporate management. Thus, in the current corporate compliance environment that places unprecedented emphasis on internal investigation and self-reporting, it is more important than ever that corporate legal departments implement effective policies and procedures that maximize the protections afforded by the attorney–client privilege. IDQ