Blogs
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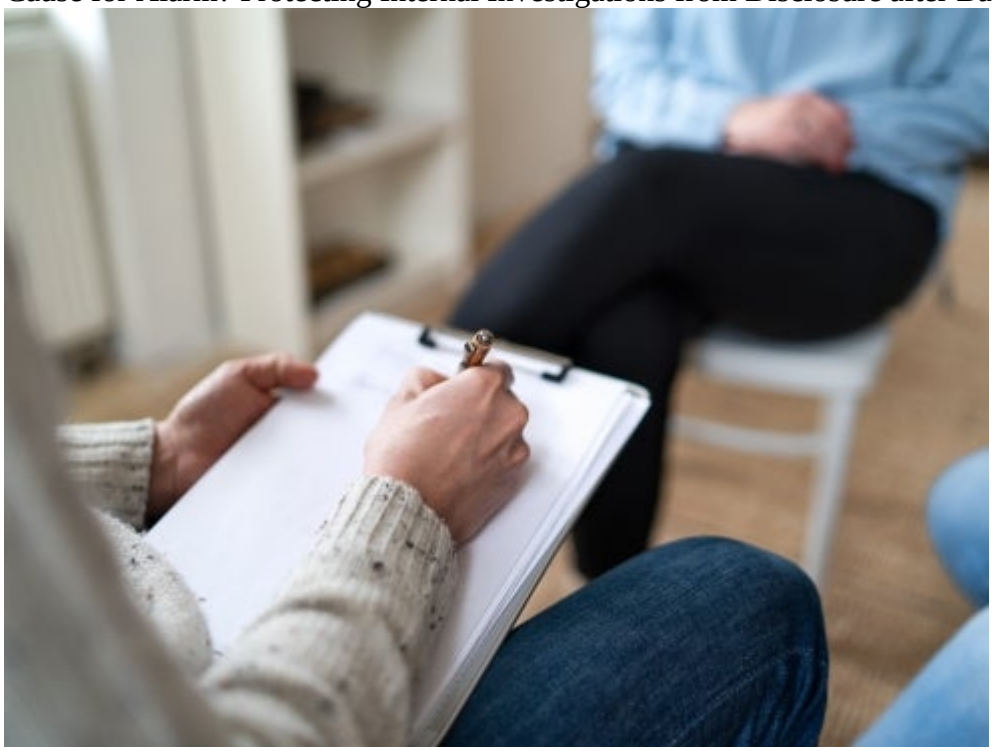
Cause for Alarm? Protecting Internal Investigations from Disclosure after Barko



Whether documents prepared in connection with an internal investigation are protected from disclosure by the attorney-client privilege or work-product doctrine is a topic of continuing interest and current debate.

On March 6, 2014, the U.S. District Court for the District of Columbia filed a much-publicized opinion in *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276, that held that internal investigation materials were not protected from disclosure by the attorney-client privilege or work-product doctrine because the investigation was not conducted ***in anticipation of litigation or to obtain legal advice***. As colleagues in Perkins Coie's government contracts practice aptly cautioned, the *Barko* decision erodes critical protections against such disclosure offered by the attorney-client privilege and work-product doctrine. Fresh on the heels of *Barko*, just this week, the family of Joe Paterno argued in a Pennsylvania court that documents generated by former FBI director Louis Freeh's law firm in its investigation into the Jerry Sandusky sex abuse scandal were not protected by the attorney-client privilege. At the same time, New Jersey lawmakers are seeking to compel disclosure of outside counsel's materials from the internal investigation regarding the New Jersey Governor's involvement in the "Bridgegate" scandal. *Barko* will likely embolden even greater numbers of litigants, as well as the government, to compel the production of sensitive information regardless of attorney-client and work-product protections.
Lessons from Barko In reaching its decision in *Barko,* the court found the following facts significant:

- Investigators did not inform employees that the investigation related to litigation
- Only non-attorneys conducted the investigation
- There was a time gap between the investigation and the subsequent litigation
- Outside counsel was not involved in the investigation

The *Barko* court also looked to a recent decision in the same district, *United States v. ISS Marine Services, Inc.*, 905 F.Supp. 2d 121 (D.D.C. 2012), which emphasized the need for "direct involvement" by counsel in the "information-gathering process," and noted that "only when counsel's strategic and legal expertise is applied and counsel's involvement becomes more direct and meaningful" does the work-product doctrine genuinely applies

to internal investigations. At first glance, *Barko* and *ISS Marine Services* send an ominous message regarding the ability to protect internal investigations from unwanted scrutiny. But closer analysis reveals several steps that in-house counsel should consider taking to preserve the attorney-client privilege during an internal investigation and, if applicable, the protections of the work-product doctrine. First, there should be direct and significant involvement by lawyers in the internal investigations -- even better if those lawyers are outside counsel. As the district court emphasized in *ISS Marine Services*, "arms-length coaching" is insufficient. Second, the company should communicate to employees that the internal investigation is in anticipation of litigation (if it indeed is) or otherwise is being undertaken in order to obtain legal advice. Employees should receive this information when they are interviewed, verbally and in any written acknowledgements used during the interviews. In-house counsel cannot control when civil parties or the government initiate civil suits, investigations, or enforcement actions. But taking steps to preserve the attorney-client privilege and work-product doctrine from the outset of any internal investigation will minimize the risks posed by *Barko* and *ISS Marine Services*.

Authors

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