



On June 27, 2014, the D.C. Circuit [vacated](#) the U.S. District Court for the District of Columbia's [hotly-debated](#) opinion in [United States ex rel. Barko v. Halliburton Co.](#), making it clear that internal investigation communications are privileged "if one of the significant purposes of the internal investigation was to obtain or provide legal advice."

The Circuit court noted that the privilege applies even if the internal investigation is conducted pursuant to a company compliance program required by statute or regulation, or is otherwise conducted pursuant to company policy. The case concerned an internal investigation conducted by Kellogg, Brown & Root, Inc. (KBR) into alleged contract fraud and kickbacks by the company while administering military contracts in Iraq. A whistleblower brought a False Claims Act case against KBR and sought discovery of the internal investigation

documents. In rejecting KBR's privilege claim, the district court found that the privilege did not protect the documents because, among other reasons, the communications would not have been made "but for" the fact that legal advice was sought. The district court also noted that the internal investigation had been "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." The D.C. Circuit granted KBR's petition for mandamus and vacated the district court's ruling. The D.C. Circuit opinion lends important clarity on several oft debated issues relating to the scope of the privilege in internal investigations. Notably, the court ruled:

- It is not necessary for outside counsel to be involved for the privilege to apply – internal investigations conducted by in-house counsel are also privileged;
- Communications made by and to non-attorneys serving as agents of attorneys in internal investigations are also protected by the privilege;
- It is not necessary that employees be expressly informed that the purpose of an interview is to assist the company in obtaining legal advice for the privilege to apply, especially where the record is clear as it was in the KBR case that employees are aware of the sensitive and confidential nature of the investigation, and that it is being conducted by attorneys.

The KBR ruling does not in any way diminish the importance of providing employees with "Upjohn warnings" so that they are aware that the company has the right to waive the privilege and disclose the communications. The ruling does, however, give companies comfort that the privilege will protect internal investigations as long as one of the significant purposes of the investigation is to provide legal advice, even if the investigation is also being conducted pursuant to a company compliance program required by statute or regulation.

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