

The Redrawing of Privilege Boundaries for Internal Investigations in the *Barko*/KBR Litigation

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INTRODUCTION

Internal investigations serve a vital corporate function. In many situations, cloaking such investigations in the confidentiality of the attorney-client privilege is paramount. However, the applicability of the privilege to internal investigations is once again the subject of some uncertainty as a result of another series of rulings in *United States ex rel. Barko v. Halliburton Company et al.*

In June 2014, the U.S. Court of Appeals for the District of Columbia Circuit upheld the privileged status of Kellogg Brown & Root, Inc.'s (KBR's) internal investigation files regardless of whether the investigation was conducted pursuant to a mandatory or voluntary compliance program.¹ The court held that the attorney-client privilege applies as long as "a significant purpose" of the investigation is to obtain or provide legal advice.²

Following the D.C. Circuit's decision, the district court in *Barko* nevertheless ordered the production of KBR's privileged investigation files on the grounds that KBR's litigation counsel impliedly and irrevocably waived the privilege by putting the content of the investigation at issue in the case, and that the privilege does not extend to reports communicated only between in-house lawyers and their non-lawyer investigators.³ These rulings, which are currently under review by the D.C. Circuit, underscore some of the issues involved in preserving the confidentiality of internal investigations.

THE CURRENT CORPORATE COMPLIANCE CLIMATE

Compliance plays an increasingly important function in today's corporate climate, particularly in industries that are either heavily regulated or subject to frequent regulatory scrutiny. Although currently there is debate concerning the optimal interplay between the functions of compliance and legal in the corporate hierarchy,⁴ the reality is that there are many situations in which a company must conduct an internal investigation concerning allegations of potential legal violations under the confidentiality afforded by the attorney-

¹ See *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757-760 (D.C. Cir. 2014), *cert. denied*, 135 S.Ct. 1163 (U.S. 2015).

² 756 F.3d at 760.

³ See *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276, 2014 U.S. Dist. LEXIS 181353, at *2 (D.D.C. Nov. 20, 2014); *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276, 2014 U.S. Dist. LEXIS 174607, at *11-18 (D.D.C. Dec. 17, 2014).

⁴ Some commentators have lobbied for companies to adopt a compliance model (dubbed Compliance 2.0) in which compliance is autonomous from legal, rather than serving as "a captive arm" (dubbed Compliance 1.0). See Donna Boehme, "3 Nails in the Coffin of 'Compliance 1.0'" (Mar. 17, 2015), <http://www.corpcounsel.com/id=1202720798097>; Donna Boehme & Michael Volkov, "4 Steps Boards Should Take Toward Compliance 2.0" (May 26, 2015), <http://www.corpcounsel.com/id=1202727418551>. Other commentators have lobbied for companies to resist this trend and maintain lawyer oversight of certain aspects of the compliance function. See R. William Ide & Crystal J. Clark, "The Chief Legal Officer's Critical Role in the Compliance Function" (July 1, 2014), Bloomberg BNA.

client privilege. This is true regardless of whether such an investigation is carried out pursuant to some compliance obligation, whether imposed by contract or regulation. Indeed, legal compliance is one of the primary justifications for the existence of a corporate attorney-client privilege.⁵ Nevertheless, courts have had some trouble determining how the privilege applies to internal investigations conducted under the auspices of “compliance” at companies in industries that are heavily regulated.⁶ The series of rulings in the *Barko/KBR* litigation is a prime example of this struggle.

THE *BARKO/KBR* PRIVILEGE LITIGATION SAGA

Barko is a *qui tam* action brought under the federal False Claims Act (31 U.S.C. § 3729 *et seq.*) in the U.S. District Court for the District of Columbia. The lawsuit was initiated by a whistleblower (known as a relator) who was a contract administrator for KBR, a U.S. Department of Defense contractor and former subsidiary of Halliburton Company. The relator claimed to have knowledge that KBR and certain of its subcontractors defrauded the U.S. government by inflating costs and accepting kickbacks while performing contracts in Iraq.

Prior to the lawsuit, KBR had received tips concerning similar allegations and conducted an internal investigation pursuant to its compliance program that was overseen by its in-house legal department. Pursuant to the Department of Defense’s contracting regulations, KBR was obligated to maintain an internal compliance program to discover and disclose improper conduct. As part of the investigation, non-lawyer investigators interviewed KBR employees, prepared summary reports of their interviews and transmitted those documents to KBR’s in-house lawyers. At the conclusion of KBR’s investigation, no disclosures were made to the government, and the government did not ultimately intervene in the *qui tam* action.

During discovery, the relator sought KBR’s internal investigation files, but KBR objected on the grounds that the documents were protected by the attorney-client privilege. When the relator moved for an order compelling the production of the documents, the district court granted the motion, ruling that the investigation materials were not privileged because the documents were created for a business purpose (*i.e.*, KBR’s compliance with regulatory disclosure requirements), and therefore the primary purpose of the materials was not to secure legal advice.⁷ In ordering the production of KBR’s investigation files, the district court noted that this was a “routine corporate ... compliance investigation required by regulatory law and corporate policy” that did not involve outside counsel, and that the documents were largely created by non-lawyers.⁸ KBR sought to overturn the district court’s production order by filing a petition for writ of *mandamus* with the D.C. Circuit. The petition was granted, and in June 2014, the D.C. Circuit issued a decision vacating the district court’s order.⁹

Following the D.C. Circuit’s decision, the relator again moved to compel the production of KBR’s investigation materials, this time arguing that they must be produced because KBR waived the privilege by putting the contents of the documents at issue in the litigation. The relator’s waiver argument focused on two specific acts taken by KBR’s counsel in the litigation:

⁵ In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court of the United States explained that an attorney-client privilege for business organizations is necessary given “the vast and complicated array of regulatory legislation confronting the modern corporation” that often requires corporations to “constantly go to lawyers to find out how to obey the law, ... particularly since compliance with the law in this area is hardly an instinctive matter.” 449 U.S. at 392 (internal quotation marks and citation omitted).

⁶ See *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 800-801 (E.D. La. 2007) (rejecting blanket privilege for every communication involving the legal department of FDA-regulated company because “[a]ccepting such a theory would effectively immunize most of the industry’s internal communications because most drug companies are probably structured like Merck where virtually every communication leaving the company has to go through the legal department for review, comment, and approval. The fact that the industry is so pervasively regulated does not justify dispensing with each company’s burden of persuasion on the elements of attorney-client privilege.”)

⁷ *United States ex rel. Barko v. Halliburton Co.*, 37 F. Supp. 3d 1, 4-6 (D.D.C. 2014).

⁸ 37 F. Supp. 3d at 5.

⁹ 756 F.3d at 764.

- KBR's litigation counsel not only designated an in-house lawyer as a witness in response to a Rule 30(b)(6) deposition notice (and allowed him to review the privileged materials in preparation for the deposition), but also elicited testimony from its own witness concerning the fact that the company conducted an investigation pursuant its internal compliance program but did not disclose any kickback violations to the government.
- KBR made references to such testimony in its motion for summary judgment (both in a footnote and as evidentiary support for its statement of material undisputed facts).

The district court granted the motion to compel, concluding that KBR impliedly waived the privilege because it affirmatively placed the contents of its internal investigation at issue in the litigation, and once again ordered KBR to produce its investigation files.¹⁰ Notably, the district court refused to allow KBR to retract the waiver by withdrawing any reliance on the lawyer's deposition testimony (which KBR attempted to do by omitting references to the evidence in its amended summary judgment papers).

In a separate and alternate ruling, the district court also concluded that the attorney-client privilege did not extend to summary reports prepared by one of KBR's non-lawyer investigators (at least to the extent that they do not reveal the substance of any confidential communications) even though the documents were prepared at the direction of and sent to KBR's lawyers.¹¹ The basis for the court's alternate ruling is that the attorney-client privilege does not apply to purely intra-lawyer communications, *i.e.*, those that "do not involve *both attorney and client*."¹² Once again, KBR has sought to overturn the district court's production order by filing a petition for writ of *mandamus* to the D.C. Circuit.¹³

THE APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE TO INTERNAL INVESTIGATIONS

The attorney-client privilege protects confidential communications between a lawyer and his or her client for the purpose of obtaining or providing legal advice.¹⁴ More than three decades ago, in *Upjohn Co. v. United States*, the Supreme Court of the United States confirmed that the attorney-client privilege applies to corporations.¹⁵ Under *Upjohn*, communications between in-house lawyers and company employees are protected by the privilege if they serve the purpose of providing legal advice to the corporation.¹⁶ The privilege applies not only to communications between counsel and company employees, but also to information collected by the client for purposes of obtaining legal advice.¹⁷

Several jurisdictions use the "primary purpose" test to determine the privileged status of corporate communications that may have both legal and business purposes.¹⁸ In *Kellogg Brown & Root*, wherein the D.C. Circuit reversed the district court's ruling in *Barko*, the court clarified that this test means asking the following question: "Was obtaining or providing legal advice a primary purpose of the

¹⁰ *Barko*, 2014 U.S. Dist. LEXIS 181353, at *37.

¹¹ *Barko*, 2014 U.S. Dist. LEXIS 174607, at *11-18.

¹² 2014 U.S. Dist. LEXIS 174607, at *8 (citations omitted; emphasis supplied in decision).

¹³ See D.C. Circuit, Case No. 14-5319.

¹⁴ See *In re Kellogg Brown & Root*, 756 F.3d at 757.

¹⁵ 449 U.S. 383, 389-395 (1981).

¹⁶ 449 U.S. at 389-395. In contrast, numerous courts have recognized that "merely copying or 'cc-ing' legal counsel, in and of itself, is not enough to trigger the attorney-client privilege." *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 630 (D. Nev. 2013).

¹⁷ *Upjohn*, 449 U.S. at 390; *In re Kellogg Brown & Root*, 756 F.3d at 757.

¹⁸ See *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) ("predominant purpose"); *United States v. Lentz*, 524 F.3d 501, 523 (4th Cir. 2008); *United States v. Nelson*, 732 F.3d 504, 518 (5th Cir. 2013), *cert. denied*, 134 S.Ct. 2682 (U.S. 2014); *Kellogg Brown & Root*, 756 F.3d at 759 (D.C. Circuit); *Apple Inc. v. Samsung Elecs. Co.*, No. 5:11-cv-01846, 2015 U.S. Dist. LEXIS 45386, at *62 n. 38 (N.D. Cal. Apr. 3, 2015).

communication, meaning one of the significant purposes of the communication?”¹⁹ Under *Kellogg Brown & Root*, a communication is privileged “if one of the significant purposes of the internal investigation was to obtain or provide legal advice.”²⁰ As long as an investigatory communication satisfies this test, the privilege attaches regardless of whether outside counsel was involved, non-lawyers were used to conduct employee interviews, or the investigation (or compliance program) was required by law or company policy.²¹

Many jurisdictions do not impose a rigid “client-to-lawyer” communication requirement and instead employ the more practical approach adopted by the Restatement (Third) of the Law Governing Lawyers, which protects any confidential communication between “privileged persons.”²² The Restatement defines “privileged persons” to include the client, the client’s lawyers and “agents of either who facilitate communications between them.”²³ Under this approach, both the Uniform Rules of Evidence and the proposed (but un-enacted) Federal Rule of Evidence 503 clarify that communications between lawyers or between a lawyer and his or her agent are still protected by the attorney-client privilege.²⁴

In *Barko*, on remand from the D.C. Circuit, the district court rejected the Restatement’s approach and ruled that reports prepared by non-lawyers and communicated to in-house lawyers, while potentially subject to work product protection (a qualified privilege), are not protected by the attorney-client privilege.²⁵ The court reasoned that “[o]therwise, a company could filter any document through its legal department and give it attorney-client privilege it would not otherwise have.”²⁶ The court’s ruling as to the scope of the attorney-client privilege in the corporate context is one of the issues currently pending before the D.C. Circuit.

¹⁹ 756 F.3d at 760 (emphasis in original). In reaching its holding, the D.C. Circuit acknowledged the daily reality facing in-house lawyers: “trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes.” *Id.* at 759-760.

²⁰ 756 F.3d at 760 (“In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance.”) (quoting Reporter’s Note to 1 Restatement (Third) of the Law Governing Lawyers § 72, p. 554 (2000)).

²¹ 756 F.3d at 757-758. The D.C. Circuit held that the district court employed the “wrong legal test” by ruling that the privilege does not apply unless the “sole purpose” of the communication is to obtain or provide legal advice. *Id.* at 759. The court noted that characterizing an internal investigation pursuant to a mandatory compliance program as serving either a “business purpose” or a “legal purpose” creates a “false dichotomy.” *Id.* at 758.

²² See, e.g., *In re Grand Jury*, 705 F.3d 133, 160 (3d Cir. 2012) (quoting Restatement (Third) of the Law Governing Lawyers §§ 68, 70 (2000)); *McAdam v. State Nat’l Ins. Co.*, No. 12-cv-1333, 2014 U.S. Dist. LEXIS 166282, at *7 (S.D. Cal. Nov. 25, 2014) (same); *SEC v. Wyly*, No. 10-cv-5760, 2011 U.S. Dist. LEXIS 87660, at *6 (S.D.N.Y. July 26, 2011).

²³ Restatement (Third) of the Law Governing Lawyers § 70, cmt. g (2000) (quoting Revised Uniform Rules of Evidence, Rule 502(b) (1974) (confidential client communications are privileged if “... (2) between [the client’s] lawyer and the lawyer’s representative, ... or (5) among lawyers and their representatives representing the same client”)); Proposed Fed. R. Evid. 503(b) (“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, ... (2) between his lawyer and the lawyer’s representative, ... or (5) between lawyers representing the client.”) Although it is unenacted, courts use proposed Federal Rule of Evidence 503 as “a useful starting place for an examination of the federal common law of attorney-client privilege.” *United States v. Yielding*, 657 F.3d 688, 707 (8th Cir. 2011) (citations omitted); *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005) (same).

²⁴ See Restatement (Third) of the Law Governing Lawyers § 70 (2000).

²⁵ 2014 U.S. Dist. LEXIS 174607, at *14.

²⁶ *Id.*

THE IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

A litigant can impliedly waive the attorney-client privilege by taking “some affirmative step” to place the content of a privileged communication at issue in the litigation.²⁷ As numerous courts have acknowledged, the privilege cannot be used “both as a sword and a shield.”²⁸ The most common situations in which an implied or “at-issue” waiver arises involve the assertion of a legal malpractice claim or raising an advice of counsel defense.

The key principle underlying the implied waiver of the attorney-client privilege is the concept of fundamental fairness to the opposing party.²⁹ As a consequence, some courts have concluded that an implied waiver can be avoided by withdrawing the litigation position that gave rise to the waiver.³⁰

In *Barko*, the district court denied KBR the opportunity to withdraw the litigation position that triggered the implied waiver, *i.e.*, KBR’s use of its in-house counsel’s testimony concerning the existence and ultimate result of its internal investigation to support its summary judgment motion.³¹ The day after the court’s ruling, and before the relator had even filed a response to KBR’s motion, KBR amended its summary judgment papers omitting all reference to the testimony. But this was not enough. In the court’s view, the law does not allow “a party [to] retract statements that create an implied waiver with virtually no consequence,” and KBR’s only option was to *default* on the claims pending against it.³² The court’s ruling on the implied waiver of the attorney-client privilege is the primary issue currently pending before the D.C. Circuit.

TAKEAWAYS FROM THE *BARKO*/KBR LITIGATION

The *Barko* court’s rulings on the applicability of the attorney-client privilege to non-client communications and the implied waiver of the privilege in defending litigation highlight some of the issues involved in maintaining the confidentiality of internal corporate investigations. Obviously, the D.C. Circuit’s impending decision will affect these important privilege issues. In the meantime, several practical takeaways can be gleaned from the *Barko*/KBR decisions:

- For any internal investigation in which confidentiality is paramount, to ensure that documents generated in the investigation are guarded by the highest level of protection (*i.e.*, the attorney-client privilege), the investigation should be directed by legal counsel (either inside or outside) with the clearly stated purpose of providing legal advice to the company concerning compliance with the law.
- The privilege is not eliminated by the use of non-lawyers to carry out the investigation, including the conducting of employee interviews, as long as the employees understand that the interview is confidential and done at the direction of legal counsel for the purpose of providing legal advice to the company.
- However, summary documents and other communications provided to in-house counsel by the company’s non-lawyer investigators may not be privileged and instead are only safe from disclosure under the qualified work product protection.
- To avoid an implied waiver situation, companies should avoid taking any litigation position that relies on the existence and conclusion of a privileged internal investigation; an even more cautious approach would be to avoid any references to such facts altogether.

²⁷ *In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005).

²⁸ *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997) (citations omitted).

²⁹ See *Bittaker v. Woodford*, 331 F.3d 715, 720-721 (9th Cir. 2003).

³⁰ See *Bittaker*, 331 F.3d at 721 (“the holder of the privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver condition.”)

³¹ 2014 U.S. Dist. LEXIS 181353, at *36-37.

³² *Barko*, 2014 U.S. Dist. LEXIS 181353, at *36-37.