



## U.S. Court of Appeals Decision Sets Parameters on Attorney-Client Privilege in Relation to Government Contracting

The United States Court of Appeals for the District of Columbia Circuit vacated a District Court decision that placed at risk sensitive, attorney-client privileged communications related to internal investigations concerning the work of government contractors. On June 27<sup>th</sup>, in *In re Kellogg Brown & Root, Inc., et al.*, No. 14-5055 (D.C. Cir. 2014) (KBR) the Court of Appeals vacated the decision in *United States ex rel Barko v. Halliburton Co. et al.*, No. 1:05—CV-1276 (D.D.C. 2014), where the court had held that a government contractor's own internal investigations, conducted under the oversight but not direct supervision of the company's legal department, were not protected by either the attorney-client privilege or the attorney work product doctrine.

The attorney-client privilege is one of the oldest and most sacrosanct privileges in the law. Generally speaking, documents and communications confidentially exchanged between an attorney and client in order to facilitate a lawyer's provisioning of legal advice are protected from discovery; that is, the client cannot be forced to disclose those documents during litigation. However, if an attorney is offering a client business advice, rather than legal advice, those communications are generally not protected by the attorney-client privilege. Similarly, materials prepared by or for an attorney (or at an attorney's direction) in anticipation of litigation are also generally protected from discovery, based on the work product doctrine.

In *KBR*, an employee of defense contractor KBR, Harry Barko, filed a False Claims Act complaint against KBR alleging that KBR and certain subcontractors defrauded the U.S. Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. In discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud, supervised by the

company's Legal Department, which KBR had conducted pursuant to its Code of Business Conduct, and as required by Department of Defense regulations.

The District Court ruled that the attorney-client privilege did not apply to KBR's internal investigation, distinguishing U.S. Supreme Court precedent on three points: (1) the KBR investigation was done without consultation with outside counsel; (2) many of the interviews in the KBR investigation were done by non-attorneys; and (3) confidentiality agreements signed by the interviewed KBR employees did not mention that the purpose of the investigation was to obtain legal advice. The Court of Appeals disagreed, holding that none of these factors relied on by the District Court were previously required to benefit from the privilege for an internal investigation, nor should they now.

More broadly, the Court of Appeals took issue with the District Court's attempt to exclude internal investigations undertaken to comply with Department of Defense regulations that required defense contractors, such as KBR, to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. In light of the highly regulated nature of government contracting and pervasiveness of corporate compliance monitoring generally required by federal regulation, the District Court's approach threatened the integrity of the attorney-client privilege for a large class of sensitive internal investigation materials related to government contractors. The District Court had taken the "primary purpose" test accepted by many courts to determine whether the internal investigation communications served primarily a legal or business purpose, and concluded that because seeking legal advice related to the government contractor's activities was not the "but for" purpose of the investigation, the primary purpose for the communications was not legal advice, but rather was business advice so the attorney-client privilege did not apply. The Court of Appeals concluded that the lower court erred because it employed the wrong legal test and, in doing so, would have excluded any communication where there was any other purpose behind the communication other than seeking legal advice.

The Court of Appeals used the following test to determine whether the attorney-client privilege applies: "was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?" Rejecting the "but for" standard, the Court of Appeals held that if one of the significant purposes of a corporation's internal investigation was to obtain or provide legal advice, then the attorney-client privilege applies. This is irrespective of whether the investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to a company policy.

While the Court of Appeals vacated a lower court decision that could have stripped a company's ability to confidentially conduct an internal investigation subject to claims of the attorney-client privilege, this does not mean the underlying facts in the investigation are protected. As the Court of Appeals pointed out, the privilege only protects the disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. A party will still be able to pursue the facts underlying the investigation, but will not be entitled to the investigation files themselves.

The decision means that KBR will not be required to produce certain communications by those who assisted KBR's attorneys in the course of KBR's internal investigation. By maintaining a more predictable environment for the assertion of related privilege claims, the *KBR* decision reinforces the importance of corporate internal investigations and rigorous compliance programs.

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This *GT Alert* was prepared by **Philip H. Cohen**, **John D. Altenburg, Jr.** and **Jozef S. Przygodzki**. Questions about this information can be directed to:

- > [Philip H. Cohen](mailto:cohenp@gtlaw.com) | +1 212.801.2145 | [cohenp@gtlaw.com](mailto:cohenp@gtlaw.com)
- > [John D. Altenburg, Jr.](mailto:altenburgj@gtlaw.com) | +1 202.331.3136 | [altenburgj@gtlaw.com](mailto:altenburgj@gtlaw.com)
- > Jozef S. Przygodzki | +1 703 903 7591 | [przygodzkij@gtlaw.com](mailto:przygodzkij@gtlaw.com)
- > Any member of Greenberg Traurig's [Government Contracts & Projects](#) team
- > Or your [Greenberg Traurig](#) attorney

<b>Albany</b> +1 518.689.1400	<b>Denver</b> +1 303.572.6500	<b>New York</b> +1 212.801.9200	<b>Shanghai</b> +86 (0) 21 6391 6633
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<b>Delaware</b> +1 302.661.7000	<b>New Jersey</b> +1 973.360.7900	<b>Seoul∞</b> +82 (0) 2 369 1000	<b>West Palm Beach</b> +1 561.650.7900

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