

July 7, 2014

clearygottlieb.com

D.C. Circuit Confirms Broad Applicability of Attorney-Client Privilege to Internal Corporate Investigations

On June 27, 2014, the United States Court of Appeals for the D.C. Circuit confirmed the broad applicability of the attorney-client privilege in the context of internal corporate investigations. A three-judge panel granted a petition for a writ of mandamus filed by Kellogg Brown & Root, Inc. (“KBR”), vacating the district court’s order in a *qui tam* action compelling production of documents related to a prior internal investigation.¹ The panel unanimously held that the attorney-client privilege protects confidential communications made by KBR employees during an internal investigation led by in-house counsel. In so holding, the D.C. Circuit clarified the scope of the attorney-client privilege as applied to internal corporate investigations. Under the court’s articulated standard, records of internal investigations led by in-house counsel are privileged so long as one of the investigation’s significant purposes was obtaining or providing legal advice, even where there are additional purposes for the investigation, or where the investigation is required by corporate policy or regulatory law.²

Background

In an action against KBR under the False Claims Act, the district court ordered KBR to produce documents related to an internal investigation conducted pursuant to corporate policy and regulatory law.³ KBR argued unsuccessfully that its investigation was undertaken for the purpose of obtaining legal advice, and that the attorney-client privilege thus protected the documents from disclosure.⁴ To determine whether the investigation was for the primary purpose of seeking legal advice, and thus privileged, the district court applied a narrow “but for” test.⁵ The district court concluded that, because the investigation was undertaken to comply with regulatory law and corporate policy, KBR could not establish that the communications would not have been made “but for” the fact that legal advice was sought.⁶ In reaching this conclusion, the district court distinguished KBR’s investigation from the internal investigation in *Upjohn Co. v. United States*, the landmark Supreme Court ruling on corporate attorney-client privilege.⁷

D.C. Circuit’s Opinion

The D.C. Circuit rejected the district court’s novel “but for” test as contrary to the principles of *Upjohn*, and concluded that KBR’s assertion of privilege is “materially

¹ See *In re Kellogg Brown & Root, Inc., et al.*, No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014).

² *Id.*

³ See *id.* at *2-*3.

⁴ *Id.*

⁵ *Id.*

⁶ See *id.* at *3; *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *2-*3 (D.D.C.

Mar. 6, 2014) (“[T]he [KBR] investigative materials do not meet the ‘but for’ test because the investigations would have been conducted regardless of whether legal advice were sought.”).

⁷ 2014 WL 1016784, at *2-*3 (distinguishing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)),

indistinguishable” from that in *Upjohn*.⁸ In particular, the court objected to the notion that KBR’s investigation could not have been undertaken for the purpose of obtaining or providing legal advice because it was mandated by regulatory law and KBR’s own corporate policies.⁹ The court further expressed concern over the sweeping effect of the district court’s “but for” test, observing that it “would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry,” and “would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege.”¹⁰

Emphasizing that it is incorrect for courts to presume that a communication can have only one primary purpose, the D.C. Circuit adopted the test set out in the Restatement (Third) of the Law Governing Lawyers, which asks whether obtaining or providing legal advice was *one of the significant purposes* of the communication.¹¹ The court of appeals further concluded that the privilege applies so long as seeking or providing legal advice was among the significant purposes of the internal investigation, “even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.”

Implications of the Opinion: Best Practices

The D.C. Circuit’s clear standard further clarifies an often uncertain area of the law. Nonetheless, clients are advised to take certain precautions to avoid any doubt that one of the significant purposes of an internal investigation is to obtain or provide legal advice, and that the attorney-client privilege therefore protects the results of the investigation.

- At the outset, internal investigations should be undertaken at the direction of legal counsel acting in a legal capacity on behalf of the company for the purpose of providing legal advice.
- Reports and memoranda prepared as part of the investigation should be prepared by legal counsel and clearly labeled as protected by the attorney-client privilege and work-product doctrine. Alternatively, if prepared by persons other than legal counsel, they should be prepared at the direction of legal counsel and contain a legend that reflects that they were prepared at the direction of legal counsel.
- Non-attorneys serving as agents of legal counsel in the internal investigation should make clear that their actions and communications are at the behest of legal counsel.
- Employee interviews, including those conducted by non-attorneys, should begin by informing the interviewee that the interview is part of an investigation undertaken at the direction of legal counsel on behalf of the company for the purpose of providing legal

⁸ *In re Kellogg Brown & Root, Inc. et al.*, No. 14-5055, 2014 WL 2895939, at *5-*7, *9 (D.C. Cir. June 27, 2014) (finding it immaterial that KBR’s investigation, unlike the investigation in *Upjohn*, was led by in-house counsel without outside lawyers, involved many interviews conducted by non-attorneys acting at the behest of in-house counsel, and provided interviewees instructions not to discuss their interviews without express authorization from in-house counsel, rather than expressly informing interviewees that the purpose of the interview was to assist the company in obtaining legal advice).

⁹ *Id.*

¹⁰ *Id.* at *9.

¹¹ *Id.* at *10; 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000).

advice. Interviewees should further be instructed to treat the interview and investigation as highly confidential.

* * *

If you have any questions concerning this memorandum, please feel free to contact any of our partners and counsel listed under "[White-Collar Defense, Securities Enforcement and Internal Investigations](#)" under the "[Practices/Areas of Law](#)" section of our website at www.cgsh.com, or any of your regular contacts at the firm.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Office Locations

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099