
DC Circuit Issues Major Ruling Affirming Broad Applicability of Attorney-Client Privilege to Corporate Internal Investigations

JULY 2, 2014

On June 27, 2014, the U.S. Court of Appeals for the D.C. Circuit issued a major decision clarifying the scope of the attorney-client privilege as applied to corporate internal investigations.

The case, *In re Kellogg Brown & Root, Inc.*, arose out of a *qui tam* False Claims Act suit against KBR. The parties disputed whether the attorney-client privilege protected from discovery various communications made in connection with KBR's internal investigation into the alleged misconduct. The District Court held that a party invoking the attorney-client privilege must show that the communication would not have been made *but for* the fact that legal advice was sought, and that KBR's investigations, which implemented both federal contracting regulations and corporate policy, would have been conducted anyway. The District Court therefore ordered KBR to disclose the communications at issue to the relator's counsel.

In a unanimous decision, the D.C. Circuit granted KBR's mandamus petition and vacated the district court's order. The Court of Appeals' opinion was authored by Circuit Judge Kavanaugh and joined in full by Circuit Judges Griffith and Srinivasan.

Most importantly, the Court of Appeals' clear, highly-protective standard for asserting the privilege as to the products of internal investigations represents a major victory for corporate counsel: "So long as obtaining or providing legal advice was *one of the significant purposes* of the internal investigation," the Court explained, "the attorney-client privilege applies, *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.*" (Emphases added.)

In so holding, the Court of Appeals rejected the district court's "but for" test. The Court also rejected the district court's view that various factors common to corporate internal investigations categorically disqualify communications from the protection of the attorney-client privilege. Rather, the privilege applies "regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to

company policy." The Court also held that it was immaterial that the communications were made to KBR's in-house counsel, rather than outside counsel.

In re KBR is a major victory for corporate counsel concerned about the applicability of the privilege in internal investigations. As the Court of Appeals recognized, the District Court's opinion "relied on a number of factors that threaten[ed] to vastly diminish the attorney-client privilege in the business setting" and indeed 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." Under the *KBR* standard, by contrast, the privilege will apply if "one of the significant purposes of the internal investigation" was to consult with in-house or outside counsel about the company's compliance with regulatory law.

WilmerHale filed an amicus brief on behalf of the Chamber of Commerce of the United States, the National Association of Manufacturers, the Coalition for Government Procurement, the American Forest and Paper Association, and the Association of Corporate Counsel, in support of KBR's petition for mandamus. Amici argued that the district court's "but for" standard was both unsupported by precedent and illogical, as in-house lawyers often perform overlapping legal and nonlegal functions within a company. Amici also explained that denying the privilege where communications are made pursuant to corporate compliance programs would penalize companies for adopting such programs, which federal law generally encourages and often requires.

The Court of Appeals agreed with all of amici's legal arguments and quoted the amicus brief's description of the far-reaching consequences of the District Court's decision: "As amici added, the District Court's novel approach has the potential to 'work a sea change in the well-settled rules governing internal corporate investigations.'"

WilmerHale Partner Carl Nichols oversaw the amicus brief; others involved include former Counsel Elisebeth Cook, former Senior Associate Leah Litman, and Associate Adam Klein.