CARLTON FIELDS

The Ethics of Internal Investigations, Domestic and Abroad

June 09, 2015

Protecting the Attorney Client Privilege during Internal Investigations after *In re Kellogg Brown & Root, Inc.*

The attorney-client privilege and the work product doctrine are two of the oldest and most sacrosanct privileges in the law. The attorney-client privilege protects the functioning of the attorney and client relationship and, in essence, requires (a) an attorney; (b) a client; (c) a relationship between the attorney and the client for the purpose of rendering and receiving legal advice; and (d) a communication between the attorney and the client; and (e) the intent that the communication be confidential. Courts have long held that the privilege ONLY applies when the attorney is providing legal advice. An attorney advising a company on how to conduct its business is not a protected communication. US courts have recognized that the privilege covers confidential communications between a company (through its employees) and its lawyers (in-house or outside counsel) regarding legal advice. Attorney client privilege has historically protected confidential employee communications in internal investigations. The case of *U.S., ex rel. Barko v. Halliburton*[1] called in to question the ability to assert the attorney client privilege regarding documents generated as a result of an internal investigation conducted under corporate policies or pursuant to certain regulatory requirements. *Barko* arises from an action brought by a former employee of Kellogg Brown & Root ("KBR") alleging certain wrongdoing by the company in the performance of its government contracts. During the discovery phase of the litigation, the former employee requested 89 reports created during internal fraud investigations conducted by KBR. KBR asserted the attorney client privilege and work product doctrine to the requests and sought protection from the court. KBR's investigations were the result of Barko's allegations of corruption related to government subcontracts. KBR's compliance office, which consisted of non-lawyers working for KBR's code of business conduct division, conducted the investigation. KBR's code of business conduct division is supervised by its legal department and the reports at issue were forwarded to the company's legal department for analysis and recommendations on action. The court conducted an *in camera* review of the documents and noted that the reports showed KBR employees had steered business and

otherwise provided preferential treatment to a particular third party, who continued to be awarded work despite poor performance. Apparently moved by the appearance of bad conduct, the court rejected KBR's assertion of the attorney client privilege. The court held that documents created during a government contractor's own internal investigation – conducted under the oversight but not direct supervision of the company's legal department – are not protected by either the attorney-client privilege or the similar but distinct attorney work product doctrine. Specifically, the court applied a "but for" test, requiring that KBR show that "the communication would not have been made 'but for' the fact that legal advice was sought." The court found that the attorney client privilege did not apply because the investigation was undertaken primarily as a result of regulatory requirements and corporate policies. The court further found that KBR would have conducted the internal investigation regardless of whether it was seeking legal advice. To support its decision, the court noted that the employees who were interviewed had not been informed that the purpose of the interview was to obtain legal advice, nor would they have been able to infer the legal nature of the interview, given that the interviews were not conducted by attorneys. In essence, the "but for" test meant that if a document or communication was not made solely for the purpose of legal advice, then the attorney client privilege argument was void. The court also rejected KBR's argument that a work product doctrine applied. The court held the work product protection only applied when the investigation documents were prepared or obtained in anticipation of litigation. In the end, the court found that because "any responsible business organization would investigate allegations of fraud, waste, or abuse," the internal investigation was not conducted for litigation purposes and, thus, the documents created during that investigation were not protected by the work product doctrine. KBR appealed and won. The D.C. Circuit reversed the lower court's findings.[2] It ruled that the denial of attorney-client privilege protections during an internal investigation was irreconcilable with *Upjohn Co. v. United States*.[3] The Court made clear that *Upjohn* does not require any "magic words' notifying employees that the purpose of the investigation was to obtain legal advice, but KBR had, nevertheless, informed employees that the legal department was conducting a confidential investigation.[4] *In re KBR* held that the materials at issue were privileged because "one of the significant purposes of the [Company's] internal investigations was to obtain or provide legal advice."[5] The D.C. Circuit court explained that the "but for" test employed by the District Court was improper. The court clarified that so long as obtained legal advice was a "significant purpose" of an internal investigation, the attorney client privilege applied even in the case of an investigation mandated by a regulatory obligations. It is important to note that other jurisdictions, including New York, California, and Florida, have held that the standard "primary purpose" of an investigation must be to obtain legal advice in order for the attorney-client privilege to apply.[6] In re KBR interpreted the "primary purpose" to mean whether one of the significant "purposes" was to obtain legal advice. While *In re KBR* ultimately preserved the attorney client privilege, this case should serve as a warning to attorneys and companies conducting internal investigations. Companies will face real risks if the attorney client privilege is challenged in court. On the other hand, companies should not forego internal investigations for fear that the attorney client privilege will be challenged. Instead, companies should take additional precautions to preserve the privilege when conducting internal

investigations. First, companies should consider appointing lawyers as key members of compliance departments and have non-lawyers report to lawyers. Lawyers should take care to define and communicate their involvement in internal investigations. Likewise, non-lawyers carrying out an investigation should regularly report to and consult with lawyers. In essence, non-lawyers should be acting as agents of the lawyers. Next, corporate policies and procedures that govern or direct internal investigations should include a specific statement that all internal investigations are to be conducted for the purpose of obtaining legal advice and at the direction of company counsel. Additionally, the legal purpose of the investigation should be documented and communicated at the beginning of the investigation. Specifically, a written statement should set forth succinctly and as narrowly as possible, describing the specific issue on which the company is seeking legal advice in that investigation. Finally, all written materials should be clearly marked "Privileged and Confidential". And distribution of materials marked "Privileged and Confidential" should be carefully restricted. ___ [1] *United States ex rel. Barko v. Halliburton Co.*, 2014 WL 1016784 (D.D.C. Mar. 6, 2014).

[2] *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014) ("In re KBR").

[3] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[4] *U.S., ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, *8 (D.D.C. Mar. 6, 2014)

[5] *In re KBR*, at 760.

[6] *See MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550 (S.D.Fla. 2013); *In re CV Therapeutics, Inc.*, 2006 WL 1699536, at *3-4 (N.D. Cal. June 16, 2006); *First Chicago Int'l v. United Exch. Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989).

Related Practices

White Collar Crime & Government Investigations