BRACEWELL

BLOG POST

… The More They Stay the Same

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The attorney-client privilege is the most sacred of our legal privileges, intended to foster free and frank communications between lawyers and clients by protecting the contents of these communications. The privilege has proven particularly important for companies conducting internal investigations, investigations that sometimes uncover less than savory information. But what if the privilege didn't apply to internal investigations unless a company could demonstrate that its *primary* purpose was to obtain legal advice? What if *everything* was discoverable just because there were other, equally significant motivating factors? Scary thought right? Well, what's scarier is that someone attempted to make that thought a reality.

In *In re Kellogg Brown & Root, Inc.*, No. 14-5055, former KBR employee, Harry Barko, filed a complaint against his old company. During discovery, he sought documents related to a prior internal investigation initiated by KBR's Law Department. Naturally, KBR argued that the documents were protected by the attorney-client privilege. Unfortunately, the District Court disagreed, holding that the privilege did not apply because the investigation was not initiated for the *primary* purpose of obtaining legal advice. The District Court even distinguished this case from the Supreme Court's seminal *Upjohn* decision because (1) KBR's investigation was conducted in-house; (2) many of the interviews were conducted by non-lawyers; and (3) the confidentiality agreements that interviewees signed did not state that the purpose of the investigation was to obtain legal advice.

In a nutshell, companies could say goodbye to the attorney-client privilege unless their internal investigation was conducted by outside counsel and for the primary purpose of obtaining legal advice—and don't forget to make sure the confidentiality agreement says that!

Mercifully, the Court of Appeals rejected the District Court's narrow construction of the attorney-client privilege, holding that the privilege applies to internal investigations if obtaining legal advice was a *significant* purpose—despite the existence of other, equally important purposes.

The Court of Appeals also summarily dismissed the District Court's *Upjohn* distinctions. But what does that really mean? Well, it means that it is not necessary to involve outside counsel, have lawyers conduct employee interviews, or use "magic words" to gain the benefit of the privilege for internal investigations.

Now, I know what you're thinking: "So what? It sounds like nothing's changed." And you're right. The status quo remains unaffected—the privilege applies just like you thought it did. Nevertheless, the D.C. Circuit's decision is important because it crystallizes the scope of the attorney-client privilege for companies contemplating internal investigations in response to regulatory—and other—concerns. Indeed, it recognizes that companies initiate internal investigations for numerous reasons while refusing to penalize them for it.