# D.C. Circuit Expresses Skepticism of Novel Attorney-Client Privilege Ruling Regarding Government Contractor Investigations

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**The U.S. District Court for the District of Columbia's recent rejection of privilege claims in *U.S. ex rel. Barko v. Halliburton*, Case No. 1:05-CV-1276, has garnered widespread attention for its potential impact on government contractors. In an oral argument yesterday on KBR's *mandamus* petition to the U.S. Court of Appeals for the District of Columbia Circuit, all three judges on the D.C. Circuit panel expressed skepticism of the District Court's legal reasoning. Procedural hurdles and case-specific facts may, however, prevent the D.C. Circuit from reaching the merits of the privilege issues.**

## The District Court's Novel Privilege Ruling

In the *Barko* case, the District Court ordered Kellogg Brown & Root ("KBR") to produce to the *qui tam* relator documents the company generated during an investigation of potential False Claims Act violations. In a novel ruling, the District Court concluded that the documents KBR generated during its Code of Business Conduct ("COBC") investigation were not protected by the attorney-client privilege or the work product doctrine because the COBC investigation was a "compliance investigation" undertaken pursuant to "regulatory law" and "corporate policy."

The District Court explained that, in order for a communication to be protected by the attorney-client privilege, the party invoking the privilege had to show that the communication was "*primarily*" for the purpose of obtaining legal advice, legal services, or assistance in a legal proceeding. Relying solely on a single district court opinion that had not been the subject of appellate review, the District Court held that, under this "primary purpose" test, the party invoking the privilege bears the burden of showing "the communication would not have been made 'but for' the fact that legal advice was sought." The District Court concluded that KBR had not met this burden because Department of Defense contracting regulations require contractors to have internal control systems such as KBR's COBC program, and thus "the COBC investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." The court ruled that the COBC investigative materials did not meet the "but for" test because the regulatory requirements and KBR's corporate policy would have required the COBC investigation to take place regardless of whether legal advice had been sought. The District Court likewise rejected KBR's assertion that the work product doctrine protected the documents, because KBR would have conducted the COBC investigation due to government regulations that required it to do so "irrespective of the prospect of litigation."

The District Court's opinion understandably sent shock waves through the government contracting industry. If read literally, the District Court's reliance on the "but for" test could call into question the application of privilege to virtually any internal investigation conducted as part of a compliance program that was intended to comply with the Federal Acquisition Regulation (FAR) requirements, including the FAR Mandatory Disclosure requirement. When faced with even the possibility that the *Barko* "but for test" could exclude sensitive investigative materials from the protections of the attorney-client privilege and work product doctrine, government contractors could be discouraged from generating such materials in the course of their investigations. This could hinder the effectiveness of internal investigations or, worse, create a disincentive for government contractors to initiate investigations in the first place. The effect of all of this could be the very opposite of the culture of compliance and disclosure that the FAR's provisions regarding internal controls and mandatory disclosure were intended to promote.

## The D.C. Circuit's Skepticism at Oral Argument

KBR filed a petition for a writ of *mandamus* with the D.C. Circuit seeking relief from the District Court's order. The U.S. Chamber of Commerce, the National Association of Manufacturers, and other associations filed an *amicus curiae* brief in support of KBR's position.

On May 7, 2014, a panel of the D.C. Circuit held an oral argument on KBR's *mandamus* petition and expressed skepticism of the District Court's reasoning. In a series of insightful questions worthy of a U.S. Supreme Court oral argument, all three judges – Thomas Griffith, Brett Kavanaugh, and Sri Srinivasan – signaled concern regarding both the legal foundation of the District Court's decision and its potential implications.

Judge Kavanaugh pointed out that both the "primary purpose" test and the "but for" test pose problems because there are almost always multiple purposes for a corporate internal investigation. Judge Kavanaugh appeared to reject the idea that either compliance with a regulatory requirement or obtaining legal advice could necessarily be deemed *the* "primary purpose" of an investigation, as the two purposes can (and often do) overlap. Perhaps tipping his hand and indicating that the panel would apply a different legal test from the one the District Court applied, Judge Kavanaugh noted that it was important that the panel "get the semantics right" if it were to publish an opinion addressing the attorney-client privilege test.

Judge Griffith further advanced Judge Kavanaugh's criticism of the notion that the application of the attorney-client privilege should turn on identifying a single primary purpose of an investigation. Judge Griffith pointed out that an effort to comply with the FAR requirements (such as the FAR Mandatory Disclosure requirement) could itself be an effort to obtain legal advice, as such disclosure decisions may inherently involve legal determinations.

Judge Srinivisan similarly highlighted the illogical nature of the District Court's test. He pointed out that, if a government contractor had a process for internal complaints and investigations *before* the FAR requirements came along, then perhaps the primary purpose of an investigation would be obtaining legal advice. But if a different government contractor developed a similar process for internal complaints and investigations only *after* the FAR requirements were adopted, one could say that the primary purpose of an investigation by that contractor was regulatory compliance rather than legal advice.

Plaintiff's counsel appeared to distance himself from the District Court's "but for" test, arguing that the District Court did not adopt a "per se" rule and did not predicate its decision on the regulatory requirement. Plaintiff's counsel instead characterized the District Court opinion as focusing on the particular documents in question to determine whether they were related to a request for legal advice. This line of argument got little traction, as the D.C. Circuit panel continued to express concern regarding the potential implications of the District Court's line of reasoning.

The panel also focused some of its attention on hurdles presented by the particular procedural mechanism by which KBR is seeking to overturn the District Court's decision. The panel challenged KBR's counsel on the nature of KBR's injury and on whether that injury could be addressed only through the extraordinary relief of *mandamus* rather than through appeal of a final judgment. The panel did not express views regarding whether the particular documents in question would likely be privileged under a different test than the one applied by the District Court.

## Conclusion

The oral argument on KBR's petition for *mandamus* sent a signal that the District Court's legal reasoning in *Barko* is not likely to win the approval of the D.C. Circuit. To the contrary, it appears likely that if the panel addresses the District Court's rationale, the result will be a test that is more protective of the attorney-client privilege in the context of internal investigations by government contractors. Nonetheless, because there are procedural hurdles to obtaining *mandamus* relief, it remains unclear whether help is on the way for government contractors and, if so, what form it will take.

If you would like to discuss the information contained within this Alert or other related matters in more detail, please contact:

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