

Nuclear Energy

Government Contracts
& Disputes

Energy

Litigation

Corporate Investigations &
White Collar Defense

May 20, 2014

Recent Decision Reminds Companies to Use Best Practices to Protect Their Internal Investigations

By Thomas C. Hill, Daryl M. Shapiro, Timothy J.V. Walsh and Rebecca Carr Rizzo

The DC Circuit recently heard oral argument regarding a mandamus petition filed by defendants in a qui tam action. The case sheds light on the best practices that companies should utilize to increase the odds that the attorney-client and work product privileges will shield their internal investigation records.

In *United States ex rel. Barko v. Halliburton*, filed in 2005, the plaintiff-relator alleges that various Kellogg Brown & Root entities and the Halliburton Company (KBR, collectively) violated the False Claims Act by incurring excessive or fraudulent contract costs and passing those costs onto the U.S. government. The United States declined to intervene, and the case was unsealed in 2009. In February 2014, the plaintiff-relator moved to compel KBR to produce documents related to KBR's Code of Business Conduct (COBC) investigations of the alleged misconduct. COBC investigations commence upon receipt of a report or anonymous tip of potential wrongdoing from an employee. In the facts of this case, the reports or tips are sent to the COBC director, a company attorney, who determines whether to investigate. If so, the COBC director refers the matter to a non-attorney Security Department manager who, in turn, directs a non-attorney Security Department employee to conduct an investigation. An investigation typically consists of employee interviews and witness statements, and reviewing of documents. The investigation report is then transmitted to the legal department.

KBR refused to produce the COBC investigation records, claiming protection under the attorney-client and attorney work product privileges. After an *in camera* review of the documents, Judge James Gwin of the U.S. District Court for the District of Columbia disagreed, holding that they were ordinary business records created to satisfy U.S. defense contractor requirements—not to obtain or receive legal advice—and ordering production of the documents. The key facts on which Judge Gwin relied are discussed in two opinions—his Order granting the motion to compel and his subsequent Order denying KBR's motion for certification of an interlocutory appeal. They include the following:

- The COBC investigation was a routine corporate and ongoing compliance investigation required by regulatory law and corporate policy and would have been conducted regardless of whether legal advice was sought.
- None of the documents requested legal advice or provided legal advice.
- Investigators, not attorneys, conducted the interviews and wrote the reports.
- The investigation was conducted between 2004-2006, but the complaint in this litigation was not unsealed until 2009.
- The employees who were interviewed were never informed that the purpose of the investigation was to assist KBR in obtaining legal advice.
- The confidentiality agreement employees were asked to sign did not mention that the purpose of the investigation was to obtain legal advice.

In its mandamus petition to the DC Circuit, KBR argued that the company's attorney-supervised efforts to comply with Federal law—i.e., determining if it needed to report wrongdoing to the Federal government—constituted quintessential legal advice and attorney work product. Otherwise, companies would be inhibited from implementing internal controls, voluntary investigations and self-reporting. In his opposition, the plaintiff-relator argued that KBR sought to create a privilege merely by passing internal investigation documents through the hands of counsel. He also argued that KBR's policy provided a special procedure for investigations whose specific purpose was to obtain legal advice, but KBR did not follow that procedure here.

At oral argument on May 7, 2014, the DC Circuit panel (Judges Griffith, Kavanaugh and Srinivasan) expressed some support for KBR's position, with Judge Srinivasan suggesting that it would not be possible to separate legal advice from the internal investigations conducted here; they were used to determine the applicability of federal regulations and whether a company needed to make a report under those regulations. However, the Court may not rule on the underlying merits because it must also address whether the matter is properly before it in a mandamus action.

Best Practices

However the DC Circuit rules, the facts of this case provide a road map of the best practices to follow to preserve the attorney-client privilege and work product privilege for internal investigation records:

- At the outset, evaluate the purpose of the investigation and assess the privileged nature of the investigation in light of that purpose.
- If you choose not to conduct a privileged investigation, keep in mind that the subsequent communications between client and counsel concerning the results of the investigation, and any work product generated on those results, can remain separate and privileged and should be clearly marked as privileged.
- If you embark on a privileged investigation:

- Attorneys should memorialize the investigation’s purpose in writing, making it clear that the investigation is being undertaken for the purpose of assessing legal issues and for the provision of legal advice to the company.
 - Attorneys should determine the scope of the investigation—i.e., which allegations are investigated and which witnesses are interviewed.
 - Attorneys should oversee the investigation and document such oversight, making it clear that the attorneys are directing and running the investigation.
 - It should be made clear to all involved with the investigation (investigators, witnesses, etc.) that the investigation is being undertaken at the direction of counsel for the purpose of the provision of legal advice to the company.
 - All witnesses should be provided an *Upjohn* warning—that the interview is being conducted for the purpose of providing legal advice to the company (and not the witness) and is protected by the attorney-client privilege.
 - All materials should be marked as attorney-client privileged and treated as such. If appropriate to mark materials as attorney work product, include that label as well.
 - Document any threat of litigation to help establish when the attorney work product privilege is to apply.
- Keep in mind that no investigation is guaranteed to be privileged, and you should always be prepared to produce investigation documentation.
 - Companies should consider seeking advice from outside counsel for assistance in determining the purpose and treatment of the investigation and involving outside counsel in their investigations. Outside counsel are traditionally viewed in solely a legal role whereas in-house counsel are sometimes viewed as performing more of a “business” than “legal” role. Accordingly, a reviewing court may be more inclined to sustain a claim of either attorney-client or work product privilege if the underlying work was performed and/or supervised by outside counsel.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

Thomas C. Hill **(bio)**
Washington, DC
+1.202.663.8073
thomas.hill@pillsburylaw.com

Daryl M. Shapiro **(bio)**
Washington, DC
+ 1.202.663.8507
daryl.shapiro@pillsburylaw.com

Timothy J.V. Walsh **(bio)**
Washington, DC
+ 1.202.663.8455
timothy.walsh@pillsburylaw.com

Rebecca Carr Rizzo **(bio)**
Washington, DC
+ 1.202.663.9143
rebecca.rizzo@pillsburylaw.com

Aaron S. Dyer **(bio)**

Los Angeles

+1.213.488.7321

aaron.dyer@pillsburylaw.com

Marc H. Axelbaum **(bio)**

San Francisco

+1.415.983.1967

marc.axelbaum@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2014 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.