Preserving Attorney-Client Privilege and Work Product Immunity During Internal Corporate Investigations

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September 17, 2015

Businesses today must navigate through an ever-growing thicket of regulatory and compliance requirements, while fighting off a barrage of new theories of legal liability. Businesses often must investigate reports of allegations of employee misconduct or potential violations of regulatory requirements. Understandably, businesses want to keep those internal investigations confidential, and often turn to legal counsel to lead their investigative efforts. Yet, the mere use of legal counsel is often insufficient to keep internal investigations confidential, and counsel must use care to actively establish and protect the confidentiality of internal investigations.

I. Federal Law

Federal law governing corporate privilege issues is well-established. "In a diversity case, such as this one, courts 'apply federal law to resolve work product claims and state law to resolve attorney-client privilege claims.'" *St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp*., 197 F.R.D. 620, 627 (N.D. Iowa 2000) (citing *Baker v. General Motors Corp*., 209 F.3d 1051, 1053 (8th Cir.2000)). The party asserting the privilege has the burden to establish the existence of the privilege.[2] *Id.*

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[1] Sammons Financial Group includes Midland National Life Insurance Company, North American Company for Life and Health Insurance, Sammons Annuity Group, Sammons Corporate Markets Group, and Sammons Retirement Services, LLC. All opinions expressed in this discussion are solely those of the author, and may not be imputed to the Sammons Financial Group and its member companies.

[2] The work product doctrine is not technically a legal privilege, but rather a common law immunity doctrine arising from the nature of the attorney-client relationship. However, many courts and commentators informally use the term "work product privilege". *See, e.g., Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (2004); *Iowa Insurance Institute v. Core Group of Iowa Ass'n for Justice*, 867 N.W.2d 58, 74 (Iowa 2015) (noting that the term "privilege" was erroneously applied to work product immunity). For ease of discussion, the term *privilege* will be used in this discussion in a broad fashion to encompass material held confidential pursuant to the work product doctrine.

A. Attorney-Client Privilege

The United States Supreme Court has established the contours of the attorney-client privilege and work product doctrine in the context of internal corporate investigations. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). In *Upjohn*, the Court was confronted with claims of attorney-client and work product privileges arising from an internal corporate investigation into whether the company's foreign office managers were engaged in making illegal or questionable payments to foreign officials. As part of the investigation, the company's general counsel sent a written questionnaire to all of the company's foreign managers, and also interviewed many of those employees in person. The Internal Revenue Service later launched an investigation of the same company practices, and subpoenaed the company's investigative materials.

Looking first at the attorney-client privilege, the Court noted:

> The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.
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> *Upjohn*, 449 U.S. at 389, 101 S. Ct. at 682.

The Court, however, noted that "complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual". *Id*., 449 U.S. at 390, 101 S. Ct. at 683. The Court considered and rejected application of the so-called "control group" test, in which privilege was limited to communications between corporate attorneys and high-ranking corporate officers and agents who play a "significant role" in directing company's operations. The Court recognized that lower level employees can expose a company to legal liability, and often have need for direction from legal counsel.

> In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney–Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, e. g., *United States v. United States Gypsum Co*., 438 U.S. 422, 440–441, 98 S. Ct. 2864, 2875–2876, 57 L. Ed. 2d 854 (1978) ("the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of

> socially acceptable and economically justifiable business conduct"). The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.
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> *Upjohn*, 449 U.S. at 392-93, 101 S. Ct. at 684.

The *Upjohn* Court did not adopt any explicit test for establishing attorney-client privilege in the corporate setting, but endorsed an analytical approach which has subsequently been referred to as the "subject matter" test. Instead of focusing on *who* is being questioned by corporate counsel, the subject matter test focuses on *why* the communication occurred:

> **The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.** As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments*." (Emphasis supplied.) 78–1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper–echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.
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> *Upjohn*, 449 U.S. at 394, 101 S. Ct. at 685 (bold added, italics in original).

B. Work Product Doctrine

Turning to the work product doctrine, the *Upjohn* Court first noted the policy reasons supporting the privilege:

> [The work product] doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id*., at 510, 67 S. Ct., at 393. The Court noted that "it is essential that a lawyer work with a certain degree of privacy" and reasoned that if discovery of the material sought were permitted
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>> "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id*., at 511, 67 S. Ct., at 393–394.
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> *Upjohn*, 449 U.S. at 397-98, 101 S. Ct. at 686-87.

In applying the version of Federal Rule of Procedure 26 then in effect, the *Upjohn* Court specifically endorsed a distinction between factual work product (*e.g.*, identities of witnesses and facts obtained from witnesses) and opinion or analytical work product (*e.g*., attorney notes about witness interviews). "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes". *Upjohn*, 449 U.S. at 399, 101 S. Ct. at 687. The Court specifically held that attorney opinion or analytical work product would be protected even upon a demonstration of substantial need and undue hardship:

> The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney–client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.
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> *Upjohn*, 449 U.S. at 401, 101 S. Ct. at 688.

The Supreme Court's approach to the work product doctrine has become firmly established in federal courts over the intervening decades. As stated by the Eighth Circuit:

> Notes and memoranda of an attorney, or an attorney's agent, from a witness interview are opinion work product entitled to almost absolute immunity. *See In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (attorney's personal recollections, notes and memoranda from interviews are absolutely protected work product); *see also Upjohn Co. v. United States*, 449 U.S. 383, 399–400, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) ("[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes"). Attorney notes reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant. In this way, attorney notes are akin to an attorney's determination as to which documents are important to a case—the latter being something we have also held to be protected work product. *See Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1189 (8th Cir.1992). ...
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> [I]f we were to assume the documents were ordinary work product, the [party seeking the documents must show] a substantial need for the documents and that the substantial equivalent of the information cannot be procured by other means. Discovery of a witness statement to an attorney is generally not allowed if that witness is available to the other party. *See In re Grand Jury Proceedings*, 473 F.2d at 849. A party also does not demonstrate substantial need when it merely seeks corroborative evidence. *See Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997) (no substantial need when documents sought would merely reinforce known inconsistencies).
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> *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000).

Probably the most significant work product issue facing corporate counsel is establishing that a document was generated "in anticipation of litigation" rather than for another purpose. This requirement is critical because:

> Although the [work product] doctrine has been applied in a variety of legal contexts, "[t]he essential element of each case ... is that the attorney was preparing for or anticipating some sort of adversarial proceeding involving his or her client." *Id.*; *Simon*, 816 F.2d at 401 ("The work product doctrine will not protect these documents from discovery unless they were prepared in anticipation of litigation.").
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> *St. Paul Reinsurance Co.,* 197 F.R.D. at 629.

As stated by the Eighth Circuit:

> Our determination of whether the documents were prepared in anticipation of litigation is clearly a factual determination:
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> > [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.
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> *Simon v. G.D. Searle & Co*., 816 F.2d 397, 401 (8th Cir. 1987) (citing 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2024, at 198–99 (1970).

In reviewing claims of work product privilege, "[t]he work product doctrine is to be applied in a commonsense manner in light of reason and experience as determined on a case-by-case basis." *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997). In analyzing whether specific documents constitute work product, the courts will examine the purpose for creation of each document:

> Documents "prepared in anticipation of litigation" may include business records that were specifically selected and compiled by the other party or its representative in preparation for litigation and that the mere acknowledgment of their selection would reveal mental impressions concerning the potential litigation*. Shelton v. American Motors Corp*., 805 F.2d 1323, 1329 (8th Cir.1986). **Documents are not protected under the work product doctrine, however, merely because the other party transferred them to their attorney, litigation department, or insurer.** *Id*. at 1328. **Nor are documents protected that were assembled in the ordinary course of business or for other nonlitigation purposes.** *Simon v. G.D. Searle & Co*., 816 F.2d 397, 401 (8th Cir.1987) (citation omitted).
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> *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1189 (8th Cir.1992) (emphasis added).

In the context of internal corporate investigations, however, documents are often created for multiple purposes: to meet statutory duties, to respond to regulatory inquiries, to determine employment actions (*e.g.*, reprimands and terminations), to improve business

operations, to mitigate negative publicity, and to manage litigation risks. Many federal courts, including those in Iowa, undertake a case-by-case analysis of these types of mixed purpose investigations when analyzing work product claims. In some cases, the federal courts have held that an investigative report generated at the request of in-house counsel in anticipation of a regulatory investigation did not arise "in anticipation of litigation" and thus were not work product and were subject to discovery. *See*, *e.g.*, *Iowa Protection & Advocacy Services, Inc. v. Rasmussen*, 206 F.R.D. 630 (S.D. Iowa 2001).

II. Iowa State Law

A. Attorney-Client Privilege

In Iowa, the attorney-client privilege has its origins in the common law, *Brandon v. West Bend Mut. Ins. Co*., 681 N.W.2d 633, 639 (2004), but has since been codified (along with other related professional privileges):

> A practicing attorney … or confidential clerk of any such person, who obtains information by reason of the person's employment, … shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.
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> Iowa Code § 622.10.

In the corporate setting, Iowa law largely tracks with the *Upjohn* subject matter test, with the Iowa supreme court having declared:

> We agree with the United States Supreme Court that the corporate attorney-client privilege should not be limited to those in the "control group." Instead, the test must focus on the substance and purpose of the communication. If an employee of a corporation or entity discusses his or her own actions relating to potential liability of the corporation, such communications are protected by the attorney-client privilege. *See Samaritan Found*., 862 P.2d at 876 ("It is universally accepted that communications directly initiated by an employee to corporate counsel seeking legal advice on behalf of the corporation are privileged."). If, on the other hand, a corporate employee is interviewed as a "witness" to the actions of others, the communication should not be protected by the corporation's attorney-client privilege.
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> *Keefe v. Bernard*, 774 N.W.2d 663, 672 (2009).

B. Work Product Doctrine

Although Iowa work product doctrine arises from common law as currently reflected in Iowa Rule of Civil Procedure 1.503, the Iowa state law work product doctrine tracks closely with federal work product doctrine; Iowa's appellate courts often favorably cite to federal work product decisions. For example, in 2009, the Iowa supreme court cited to *Upjohn* itself in examining the scope of the Iowa work product privilege:

> As was the case in Hickman and Upjohn, the Keefes are demanding discovery of attorney notes of a witness's statement created in anticipation of litigation. This type of discovery has been held to be opinion work product. *Baker v. Gen. Motors Corp*., 209 F.3d 1051, 1054 (8th Cir.2000). "Attorney notes reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant." *Id*.; *see also Upjohn*, 449 U.S. at 399-400, 101 S. Ct. at 687-88, 66 L. Ed. 2d at 597-98 ("Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes....").
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> We agree a memorandum prepared by counsel concerning counsel's recollections of an interview with a treating physician in a medical malpractice case constitutes attorney work product. Therefore, the memorandum at issue in this case constitutes attorney work product. Facts or information contained in the memorandum are discoverable upon a showing of "substantial need" and "undue hardship." However, in accordance with the two tiers of work product recognized by Iowa rule 1.503(3), we hold "so much of the work product that reflects the mental impressions or opinions of the lawyer is, for all practical purposes, absolutely immune from discovery." *Shook*, 497 N.W.2d at 886; *accord Squealer Feeds v. Pickering*, 530 N.W.2d 678, 689 (Iowa 1995) (citing *Shook*), *overruled on other grounds by Wells Dairy*, 690 N.W.2d at 44-47.
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> *Keefe v. Bernard*, 774 N.W.2d 663, 673-74 (2009).

Until 2004, Iowa applied a "primary purpose" analysis to determine whether a document was prepared "in anticipation of litigation". The Iowa supreme court, however, came to view the "primary purpose" test as overly restrictive, and followed a number of federal courts in adopting a broader analysis:

> Accordingly, we hold that the overarching inquiry in determining whether a document was prepared in anticipation of litigation is "whether, in light of the nature of the document and the factual

situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Wright & Miller § 2024, at 198–99. If documents "would have been created in essentially similar form irrespective of the litigation[,] ... it [cannot] fairly be said that they were created 'because of' actual or impending litigation." *Adlman*, 134 F.3d at 1202 (citation omitted).

> *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 48 (2004).

Even under this broader test for work product privilege, there is a great deal of murkiness surrounding "mixed purpose" investigations, such as when an investigative report is written both as part of an investigation of business practices or a regulatory inquiry, while also potentially being used in future litigation. Older Iowa appellate cases using the narrower "primary purpose" test still found work product protection for investigative reports. For example, the Iowa supreme court found an insurer's internal investigation of a claim was protected work product:

> It does not matter that the investigation is routine. Even a routine investigation may be made in anticipation of litigation. *See Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 976 (E.D. La. 1974); *Almaguer v. Chicago, Rock Island & Pacific Railroad*, 55 F.R.D. 147, 149 (D. Neb. 1972). Thus a document prepared in the regular course of business may be prepared in anticipation of litigation when the party's business is to prepare for litigation
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> *Ashmead v. Harris*, 336 N.W.2d 197, 200 (Iowa 1983).

Similarly, the Iowa supreme court previously held that an otherwise routine internal police review investigation was entitled to work product protection when litigation was a primary purpose in initiating the investigation:

> The fact that an investigative body regularly conducts investigations for a variety of possible future purposes does not compel the conclusion that the primary purpose of a particular investigation was not to prepare for litigation. The IAU should not automatically be denied the protection of rule 122(c) for all its investigative materials simply because some of its investigations are not conducted in anticipation of litigation. We reiterate the standard adopted in *Ashmead* that the determinative issue is whether the primary motivating purpose for the creation of the materials in question was to prepare for litigation.
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> *Schaeffer v. Rodgers*, 362 N.W.2d 552, 556 (Iowa 1985).

Regardless of the lack of clarity for determining when internal investigative reports are protected by the work product doctrine, it seems clear the Iowa supreme court still recognizes that "'prepared in the ordinary course of business' and 'prepared in anticipation of litigation' are not mutually exclusive concepts." *Wells Dairy*, 690 N.W.2d at 44.

III. Self-Critical Analysis Privilege

In recent years, some federal courts have recognized a limited "self-critical analysis" privilege in connection with internal corporate investigations, particularly those performed in connection with regulatory compliance functions. The idea for the privilege is to encourage reporting of information that is useful from a corporate improvement or regulatory compliance viewpoint, but which might be damaging to the company in separate litigation. As noted by the Iowa supreme court in *Wells Dairy*:

> Those courts that recognize a federal self-critical analysis privilege generally require three criteria to be met for the information to qualify for protection: first, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.

Torres v. Kuzniasz, 936 F. Supp. 1201, 1214–15 (D. N.J.1996) (citations omitted). "Even where a self-critical analysis privilege has been held to exist, ... that privilege is clearly limited to expressions of opinion or recommendations, and not to facts underlying such opinions or recommendations." *Price v. County of San Diego*, 165 F.R.D. 614, 619 (S.D. Cal.1996) (citing *Granger v. Nat'l R.R. Passenger Corp*., 116 F.R.D. 507, 510 (E.D. Pa.1987)).

The Iowa supreme court has recognized the self-critical analysis privilege only in the limited context of hospital or medical peer review panels, a privilege specifically authorized by Iowa Code § 147.135. *See Carolan v. Hill*, 553 N.W.2d 882 (Iowa 1996). The court has specifically declined to expand the self-critical analysis privilege further, declaring that decision to be a policy matter for the legislature. *Wells Dairy*, 690 N.W.2d at 49.

For Iowa counsel facing litigation in states outside Iowa, self-critical analysis privilege should be considered where appropriate. Similarly, companies operating subject to state or federal regulatory oversight may well have limited privileges associated with various required reporting functions.

IV. *Barko v. Halliburton*: Dodging a Bullet

A recent federal district court decision, *Barko v. Halliburton*, 37 F. Supp. 3d 1 (D.D.C. 2014), raised concerns about the confidentiality of documents from internal corporate compliance investigations. Although the district court's ruling may ultimately be an outlier (and was in fact reversed by the D.C. Circuit Court of Appeals in roughly three months), it remains instructive in the kinds of factors courts will look to in analyzing claims of attorney-client and attorney work product privileges in the context of internal compliance investigations.

Barko arose out of a federal qui tam action asserting fraudulent business practices in connection with a federal contractor ("KBR"). KBR asserted attorney-client and attorney work product privileges with respect to a variety of documents which were produced in the course of internal corporate compliance investigations (referred to as Code of Business Conduct / "COBC" investigations). The investigations were usually initiated upon receipt of an internal complaint or tip (often anonymous) from an employee asserting that certain business activities were in violation of federal contracting regulations. In this particular case, the documents at issue reflected an internal finding that a subcontractor was receiving improper preferential treatment in bidding for jobs, was performing substandard work that was covered up, and was approved for full payment of invoices without regard for quality of work or timeliness of completion. In some instances, there were findings that the subcontractor paid off KBR employees in exchange for this preferential treatment.

An important factor in the district court's analysis was that KBR's COBC investigation process is a requirement mandated by federal regulations for most federal defense contractors:

> Department of Defense contracting regulations require contractors to have internal control systems such as KBR's COBC program to "[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts." These regulations further require a "written code of business ethics," "internal controls for compliance," "[a] mechanism, such as a hotline, by which employees may report suspected instances of improper conduct," "[i]nternal and/or external audits," "[d]isciplinary action for improper conduct," "[t]imely reporting to appropriate Government officials," and "[f]ull cooperation with any Government agencies."

The district court acknowledged the U.S. Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), which held that attorney-client and attorney work product privileges apply to in-house counsel "as long as '[t]he communications at issue were made by [company] employees to counsel for [the company] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.'" However, the district court found that *Upjohn* did not control and the COBC documents were not privileged, primarily because **"The COBC investigation was a routine corporate, and**

apparently ongoing, compliance investigation required by regulatory law and corporate policy."

Some of the factors the district court found important to its analysis included:

- "The COBC investigations resulted from the need to comply with government regulations."
- The COBC investigations would have been conducted regardless of whether legal counsel were involved.
- Outside counsel was not consulted in determining whether to pursue any specific internal COBC investigation.
- Employees interviewed in the COBC investigation process "were never informed that the purpose of the interview was to assist KBR in obtaining legal advice."
- "The confidentiality agreement employees signed never mentions that the purpose of the investigation is to obtain legal advice."
- Employees were interviewed by a non-attorney.
- "KBR conducted this COBC internal investigation in the ordinary course of business irrespective of the prospect of litigation. KBR would not have 'simply sat on its hands in the face of these allegations' because 'any responsible business organization would investigate allegations of fraud, waste, or abuse in its operations.'"

KBR sought an interlocutory appeal before the D.C. Circuit Court of Appeals which was granted. In a decision issued less than four months after the district court decision, the D.C. Circuit reversed the district court's decision. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). The D.C. Circuit found that the *Upjohn* line of cases remained good law and, because KBR's investigation was "materially indistinguishable" from *Upjohn*, *Upjohn* was controlling authority. The D.C. Circuit made several important points:

- "*Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege."
- "[T]he investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys

serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."

- "[N]othing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. [cite]. KBR employees were also told not to discuss their interviews 'without the specific advance authorization of KBR General Counsel.'"

- "So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, 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."

The D.C. Circuit also expressly rejected the district court's reliance on a "but for" or "sole purpose" test for determining when privilege would apply. Rather, the D.C. Circuit relied upon the "primary purpose" test, which holds that privilege will apply when a primary purpose of the communication is to obtain legal advice. The D.C. Circuit specifically noted that there may well be more than one primary purpose to a communication (*e.g.*, getting legal advice, compliance advice, and business advice), but observed that privilege will apply so long as obtaining advice was a significant purpose for the communication:

> Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, "In general, American decisions agree that the

> privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT § 72, Reporter's Note, at 554. We agree with and adopt that formulation – "one of the significant purposes" – as an accurate and appropriate description of the primary purpose test. **Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.**
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> In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true 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. *Cf.* Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) ("Helping a corporation comply with a statute or regulation – although required by law – does not transform quintessentially legal advice into business advice.").
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> *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 759-60 (emphasis added).

Despite the D.C. Circuit's reinforcement of a broad attorney-client privilege for internal corporate investigations, this remains an area of the law where similar attacks can be expected in future litigation.

V. Special Issues for Corporate Attorney-Client Privilege

The special nature of corporate attorney-client and work product privileges raises special issues. Some of the more important issues for corporate counsel to consider include:

- **Ownership of the Privilege / Employee Representation:** Because the client is the company, the company owns the privilege. Employees who are interviewed as part of the company investigation need to understand that the company may use the information it gathers in a manner detrimental to the employee. Further, the corporation may waive the privilege when pursuing a claim against the employee, or as part of a regulatory action, to the detriment of the employee. Employees should be given clear warnings (sometimes referred to a "*Upjohn* warnings") during interviews to alert them to this issue so as to avoid claims of a joint defense of the employee. *See Keefe v. Bernard*, 774 N.W.2d at 669-70 (finding that corporate attorney who interviewed employee witness who was not a party to the litigation did not represent the

witness, and thus attorney-client privilege did not attach to preclude discovery of witness interview notes).

- **Ownership of the Privilege / Corporate Sale or Merger:** As noted above, the company owns the privilege. But what happens if a company is sold or merged? Generally speaking, the current owners of the company control the privilege, and may waive it, *including in litigation against the sellers of the company*. *See Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663 (N.Y. 1996) (privileged communications related to the merger transaction itself were retained by a selling stockholder, but rights with respect to other attorney-client communications were transferred to the buyer at closing); *but see Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 162 (Del. Ch. 2013) (court determined that the selling company's attorney-client privilege covering pre-closing communications transferred to the buyer following closing). Corporate counsel should think of including control of the privilege as an item to be dealt with explicitly in the closing documents for the sale of any company.

- **Waiver:** Both the attorney-client and work product privileges can be waived. Express waiver is rare, and usually the product of calculated litigation strategy. Implied waiver, however, can also occur, and often is contrary to the wishes of the holder of the privilege. For example, an attorney representing both an insurer and its insured, or a company and its employee, can easily run afoul of a claim of implied waiver if the interests of the parties should diverge. *See*, *e.g.*, *Brandon v. West Bend Mut. Ins. Co*., 681 N.W.2d 633 (2004). Also, if a company takes a position in litigation that it relied on the advice of counsel—say, in a bad faith case or a regulatory investigation—the privilege may be waived, at least so as far as to those communications related to the company decision being defended. *See*, *e.g.*, *Barko v. Halliburton*, 75 F. Supp. 3d 532 (D.D.C. 2015), *reversed sub nom In re Kellogg Brown & Root, Inc.*, --- F.3d ---, 2015 WL 4727411 (D.C. Cir. Aug. 11, 2015) (district court held company waived attorney-client and work product privileges by asserting on summary judgment that the company's failure to file a regulatory report implied no wrongdoing by company; court of appeals reversed, finding that waiver had not occurred under the limited circumstances of the pleadings at issue at that point in the case).

- **Dual Roles for Attorneys:** In many corporate settings, attorneys will fill multiple roles, sometimes acting as legal counsel, while other times acting in a business capacity. Most courts will not permit a blanket assertion of privilege for every meeting, conference call, email, memo, or other communication which involves an attorney. Rather, the company must

establish that the attorney was providing legal counsel in order to assert the privilege:

> The lawyer whose testimony the government seeks in this case served as in-house attorney. That status alone does not dilute the privilege. *United Shoe Machinery Corp*., 89 F. Supp. at 360; *see Upjohn Co. v. United States*, 449 U.S. 383, 394–95, 101 S. Ct. 677, 685, 66 L.Ed.2d 584 (1981); *United States v. AT & T*, 86 F.R.D. 603, 615 (D.D.C.1979). We are mindful, however, that C was a Company vice president, and had certain responsibilities outside the lawyer's sphere. The Company can shelter C's advice only upon a clear showing that C gave it in a professional legal capacity. *See S.E.C. v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 683 (D.D.C. 1981).
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> *In re Sealed Case*, 737 F.2d 94, 99 (D.D.C. 1984).

VI. Practice Pointers for Preserving Privilege

To maximize the potential for assertion of broad attorney-client and attorney work product privileges to internal corporate investigations, the following guidelines should be considered:

- For high risk, critical, or sensitive investigations, outside counsel should be retained to direct and document the investigation.
- In-house legal counsel should coordinate and control all investigations (with the advice and direction of outside counsel where appropriate).
- Non-attorneys working on the investigation should be given explicit written instructions making it clear they are working for and at the direction of the company's legal department or its outside counsel.
- Where possible, document that a particular compliance investigation—including any associated witness interviews, document reviews, and reporting—was initiated and is being conducted in anticipation of actual or potential litigation.
- Advise all employees interviewed in the investigation that all interviews are confidential, being conducted on behalf of the company, and subject to the company's attorney-client privilege.

- Reports, summaries, and other sensitive written communications should be distributed to in-house attorneys only (and to outside counsel when involved).

- Any internal investigation report should be authored by legal counsel (in-house or outside counsel) and include the attorney's legal recommendations and advice to the company.

- Educate employees that there is no "magical privilege"—merely copying an attorney on an email, or having an attorney at a meeting may be insufficient to establish attorney-client or work product privilege.