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D.C. Circuit Court Upholds Attorney-Client Privilege in Internal Investigations

By Philip Storm

Internal investigations play a lead role in a company's effective ethics and compliance program. They are one of the best ways for a company to detect, thoroughly understand, and remedy situations that may violate its code of conduct, and they provide a business-friendly solution before misconduct or non-compliance grows deeper or wider.

On June 27, 2014, the U.S. Court of Appeals for the District of Columbia¹ shored up the rights of companies to conduct investigations protected by the attorney-client privilege. It ruled that the attorney-client privilege remains solidly intact for internal investigations so long as "obtaining or providing legal advice" was "a primary purpose" of the investigation.

The decision reversed a hotly debated district court ruling that threatened to permit disclosure of investigation-related documents, created as part of the company's internal investigation of alleged government fraud. In its controversial take on the attorney-client privilege, the lower court ruled that the communications made and the documents gathered as part of the company's internal investigation were not protected by the privilege because the company undertook the investigation primarily to comply with government regulations and company policy, rather than for the purpose of obtaining legal advice—specifically, to comply with a regulation requiring contractors to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The court's all-too-simple test, if left standing, supplied an easy rationale for litigants and investigative authorities to undermine the privilege in the vast majority of "compliance program" investigations, where a company investigates to ensure compliance with law or policy.

In reversing the lower court, the appeals court invoked the Supreme Court's long-standing *Upjohn* decision, which encourages privileged communications as companies navigate a complex maze of regulations and laws:

The [*Upjohn*] court explained that the attorney-client privilege for business organizations was essential in light of the 'vast and complicated array of regulatory legislation confronting the modern corporation,' which require corporations to 'constantly go to lawyers to find out how to obey the law...particularly since compliance with the law in this area is hardly an instinctive matter.'

¹ *In re: Kellogg Brown & Root, Inc., et. al*, No. 1:05-cv-1276 (D.C. 2014).

Against that background, the D.C. Circuit ruled that the privilege applies to internal investigations where one of the significant purposes is obtaining or providing legal advice. This remains true whether a company conducts its investigation because of “a company compliance program required by statute or regulation, or... pursuant to company policy.”

Takeaways for Employers

This is a positive ruling for domestic and international companies required by law to maintain compliance programs. Significantly, the ruling reinforces the importance of prompt and effective internal investigations to a company’s compliance program and the value of the attorney-client privilege when a company undertakes code of conduct investigations.

At the same time, a company should not make a decision to conduct investigations under privilege routinely or haphazardly; it requires a conscious and proactive investigation plan at the outset of the review. Not every matter warrants assertion of the privilege, and a company’s late, inconsistent or intermittent oversight of investigations still places its claim of privilege in jeopardy. And even when the privilege remains intact, it does not protect against the disclosure of the underlying facts of the investigation.

The attorney-client privilege encourages businesses to contact their attorneys promptly, before an internal investigation gets underway, to ensure candid communication about the legal risks and to foster compliance with the law in all stages of the investigation from intake to interviews to remedial measures. Given the recent proliferation of laws and regulations and the economic risks related to mishandled investigations, the importance of the privilege has unquestionably increased since the Supreme Court decided *Upjohn*. The appellate court’s decision recognizes and reinforces this fundamental legal right.

[Philip Storm](#) is a Shareholder in Littler’s Chicago office and a member of the firm’s Ethics, Compliance and Whistleblower group. This group advises companies on effective compliance programs, supports and conducts investigations, and holds compliance training workshops worldwide. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Storm at pstorm@littler.com.