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In his July 9, 2014 “Privilege Points” release, Tom Spahn discusses privilege protection for internal investigations:

After a decade or more of generally bad news for corporations seeking privilege protection for their internal corporate investigations, the District of Columbia Circuit has issued an opinion containing good news on all fronts.

In March 2014, the District of Columbia District Court denied attorney-client privilege and work product doctrine protection for documents Kellogg Brown & Root (KBR) (and affiliates) created during an internal corporate investigation. *United States ex rel. Barko v. Halliburton Co.*, Case No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 36490 (D.D.C. Mar. 6, 2014). Five days later, the court denied a stay. *United States ex rel. Barko v. Halliburton Co*, Case No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 30866 (D.D.C. Mar. 11, 2014). The District Court used a narrow version of the "primary purpose" test for privilege protection -- holding that "[t]he party invoking the privilege must show the 'communication would not have been made "but for" the fact that the legal advice was sought.'" *Halliburton*, 2014 U.S. Dist. LEXIS 36490, at *7-8 (citation omitted). In applying this standard, the District Court pointed to a number of facts, including (1) the investigation "resulted from the Defendants [sic] need to comply with government regulations"; (2) nonlawyers conducted the interviews; (3) those nonlawyers did not give *Upjohn* warnings informing the interviewed employees "that the purpose of the interview was to assist KBR in obtaining legal advice"; and (4) the interviewed employees signed confidentiality agreements that did not mention the investigation's legal purpose. *Id.* at *9-10. In most courts, these factors would probably have doomed KBR's privilege claim even under a more favorable "primary purpose" test.

The next two Privilege Points will describe the District of Columbia Circuit Court's reversal of this ruling.