

## PUBLICATION PENDING

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### REDEFINING THE RELATIONSHIP OF THE GENERAL COUNSEL AND CHIEF COMPLIANCE OFFICER

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*"Change is the law of life and those who look only to the past or present are certain to miss the future."*

—John F. Kennedy

#### I. The Independent Chief Compliance Officer Versus the General Counsel

Change is hard to accept for those who are looking to the past. We are all guilty, at one point or another, of resisting change. Such resistance, however, usually gives way to evident improvements that directly result from change. In the end, we all learn an important lesson in life – change can be good.

Over the last ten years, there has been a sea change in the positioning and responsibilities of Chief Compliance Officers (CCOs). CCOs are being elevated in the corporate governance world to assume increasing responsibilities and carry new burdens. At the same time, corporate leaders are empowering CCOs and compliance professionals as independent forces within the company.<sup>1</sup>

The independent, empowered CCO is favored by many corporate governance experts, compliance experts, the United States Sentencing Commission, federal prosecutors and regulators and numerous studies which support the proposition that separation of the compliance function from legal is a best practice and one that should be encouraged by everyone in the governance field.<sup>2</sup>

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<sup>1</sup> The 2013 PWC State of Compliance Survey highlights, among other trends, that CCOs are “gaining

<sup>2</sup> Survey conducted by Society for Corporate Compliance and Ethics and Health Care Compliance Association, March 11, 2013, available at <http://www.corporatecompliance.org/Resources/View/ArticleId/918/Compliance-professionals-overwhelmingly-reject-general-counsel-reporting-structure.aspx> <http://www.corporatecompliance.org/Login.aspx?returnurl=%2fResources%2fView%2fArticleId%2f909%2fShould-Compliance-Report-to-the-General-Counsel.aspx> (finding that 88 percent of compliance professionals oppose General Counsel also serving as chief compliance officer); Keshav Nair, *Brave New World for the CCO*, The Network GRC Blog, January 8, 2013 available at [http://www.tnvinc.com/index.php/blog/comments/brave\\_cco](http://www.tnvinc.com/index.php/blog/comments/brave_cco); *The Business Case for Creating a Standalone Chief Compliance Officer Position*, Ethisphere available at <http://m1.ethisphere.com/resources/whitepaper-separation-of-General-Counsel-and-cco.pdf>; *GRC: The Evolution Chief Ethics and Compliance Officer Role*, Scott Giordano, CMS Wire, June 9, 2011, available at <http://www.cmswire.com/cms/information-management/grc-the-evolution-chief-ethics-and-compliance->

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The momentum for CCO independence is further validated by a new LRN research study on compliance program effectiveness that found:

“Programs led by an individual reporting to either the CEO or the board (or one of its committees) substantially outperform those reporting to the general counsel.”<sup>3</sup>

This trend is not in response to an aggressive enforcement environment. The message behind compliance has finally been heard – effective ethics and compliance programs contribute to the bottom line by increasing profits and enhancing sustainable growth.<sup>4</sup> A key ingredient for an “effective” ethics and compliance program is an independent and empowered CCO.<sup>5</sup>

For years before this current trend, CCOs were reporting to the General Counsel and classified as a portion of the corporate legal department. Those days are gone.

Annual survey information confirms what we already know – companies are extricating CCOs from the legal department, elevating them to senior management positions, clarifying their separate mandate, and having them report to the CEO or other top executives. Along with this new position, companies are finally increasing resources to the compliance function to manage the enormous and often perilous job of preventing and detecting misconduct within the organization.<sup>6</sup>

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[officer-role-011557.php](#); Jacelyn Jaeger, *The Importance of Splitting Legal and Compliance*, Compliance Week, December 2011, available at [http://www.mwe.com/info/pubs/splitting\\_legal\\_and\\_compliance.pdf](http://www.mwe.com/info/pubs/splitting_legal_and_compliance.pdf); Jose Tabuena, *The Chief Compliance Officer vs. the General Counsel: Friend or Foe?* Compliance & Ethics Magazine, (December 2006), available at [http://complianceethicsinstitute.org/handouts/2008/conference/tues/601/Tabuena\\_reprint1206.pdf](http://complianceethicsinstitute.org/handouts/2008/conference/tues/601/Tabuena_reprint1206.pdf); *Health Care Compliance Officer and Legal Counsel Relationships*, Health Law Blog, Feb. 20, 2011, available at <http://www.healthlaw-blog.com/2011/02/compliance-officer-and-legal-counsel-dual-role/>; *An Integrated Approach to Corporate Compliance*, Department of Health and Human Services and American Health Lawyers Association, July 1, 2004, available at <https://oig.hhs.gov/fraud/docs/complianceguidance/Tab%204E%20Appendx-Final.pdf>.

<sup>3</sup> The 2014 Ethics and Compliance Program Effectiveness Report is described by LRN as “the first serious, comprehensive analysis of ‘program effectiveness’ in terms of its impact on the behaviors and attitudes that make up organizational culture.” <http://pages.lrn.com/the-2014-ethics-and-compliance-program-effectiveness-report>

<sup>4</sup> See Simon Webley and Elise More, *Does Business Ethics Pay*, Institute of Business Ethics (2003) available at <http://www.ibe.org.uk/userfiles/doesbusethicpaysumm.pdf>.

<sup>5</sup> <http://corruptioncrimecompliance.com/2013/04/an-independent-cco-is-a-compliance-program-requirement/>

<sup>6</sup> *Thomson Reuters Cost of Compliance 2014*, available at <http://accelus.thomsonreuters.com/sites/default/files/GRC00814.pdf>; *SAI Global 2013 C&E Benchmarking Survey*, available at <http://compliance.saiglobal.com/assets/whitepapers/SAI-GLOBAL-whitepaper-2013-global-ce-benchmarking-survey.pdf>; *Deloitte’s Compliance Trends Survey 2013*, available at

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The survey information also confirms public reports by many major companies that have elevated and separated CCOs from the legal function in the financial, oil and gas, health care and retail industries, among others. Some of these changes have been adopted in response to government enforcement actions but some have not. The list of high-profile companies includes: Wal-Mart,<sup>7</sup> HSBC,<sup>8</sup> J.P. Morgan,<sup>9</sup> Goldman Sachs,<sup>10</sup> Barclays, UBS, Gap, Parker Drilling, and a long line of companies in the health care industry such as Pfizer,<sup>11</sup> Johnson & Johnson, Eli Lilly and Merck.

For General Counsels, the elevation of the CCO has brought about change in their own responsibilities and roles. Many often forget that, over the last few decades, General Counsels have seen their own stock rise in the corporate governance marketplace – gone are the days when General Counsels sat in an office opining on legal issues to keep the company in compliance with the law. Instead, General Counsels have taken on a greater business role in the company. CEOs often rely on their General Counsel for more than just “legal” advice and seek guidance on “business” issues.

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[http://www.deloitte.com/view/en\\_US/us/Services/audit-enterprise-risk-services/governance-regulatory-risk-strategies/Regulatory-Compliance-Services/256ad7d579d50410VgnVCM3000003456f70aRCRD.htm](http://www.deloitte.com/view/en_US/us/Services/audit-enterprise-risk-services/governance-regulatory-risk-strategies/Regulatory-Compliance-Services/256ad7d579d50410VgnVCM3000003456f70aRCRD.htm)

<sup>7</sup> See Wal-Mart Global Compliance Program Report <http://corporate.walmart.com/global-responsibility/global-compliance-program-report-on-fiscal-year-2014>; Matt Kelly, *Walmart Outlines Compliance Reforms* (April 23, 2014), available at <http://www.complianceweek.com/walmart-outlines-compliance-reforms-part-i/article/343986/>.

<sup>8</sup> Rachel Ensign, *HSBC Confirms Compliance Reorganization*, Wall Street Journal, November 15, 2013 available at <http://blogs.wsj.com/riskandcompliance/2013/11/15/hsbc-confirms-compliance-reorganization/>; Boehme, Donna, *DOJ Tells HSBC and Corporate America: Reform Your Compliance Departments*, Corporate Counsel, December 20, 2012, available at [http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202582054989&DOJ\\_Tells\\_HSBC\\_and\\_Corporate\\_America\\_Reform\\_Your\\_Compliance\\_Departments](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202582054989&DOJ_Tells_HSBC_and_Corporate_America_Reform_Your_Compliance_Departments).

<sup>9</sup> Donna Boehme, and Michael Volkov, *J.P. Morgan Chase Takes a Giant Step on CCO Independence*, Corporate Counsel, January 29, 2013, available at [http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202586012597&JPMorgan\\_Chase\\_Takes\\_a\\_Giant\\_Step\\_on\\_CCO\\_Independence&slreturn=20130302204109](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202586012597&JPMorgan_Chase_Takes_a_Giant_Step_on_CCO_Independence&slreturn=20130302204109);

<sup>10</sup> Donna Boehme, *Big Banks Giving the CCO a Seat at the Table*, Corporate Counsel (March 1, 2013), available at [http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202590410783&Big\\_Banks\\_Giving\\_the\\_CCO\\_a\\_Seat\\_at\\_the\\_Table](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202590410783&Big_Banks_Giving_the_CCO_a_Seat_at_the_Table).

<sup>11</sup> See Pfizer settlement, available at [http://www.oig.hhs.gov/fraud/cia/agreements/pfizer\\_inc.pdf](http://www.oig.hhs.gov/fraud/cia/agreements/pfizer_inc.pdf); Amy Miller, *Going With Plan B: Pfizer GC No Longer Oversees Compliance*, Corporate Counsel (September 10, 2009), available at [http://www.law.com/jsp/article.jsp?id=1202433692974&Going\\_With\\_Plan\\_B\\_Pfizer\\_GC\\_No\\_Longer\\_Oversees\\_Compliance&slreturn=20130229164233](http://www.law.com/jsp/article.jsp?id=1202433692974&Going_With_Plan_B_Pfizer_GC_No_Longer_Oversees_Compliance&slreturn=20130229164233).

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Even with this significant change in the respective roles of the CCO and the General Counsel, there are some who resist this movement. Some General Counsels long for the old days when they controlled the CCO, and when they ultimately were responsible for the design and implementation of the company's ethics and compliance program. Some General Counsels have resisted the elevation of the CCO as a direct threat to their own interests. This resistance can take many forms, some of which merely reflect intra-company squabbles and politics. Some of the controversy may arise from an imperfect understanding of the modern mandate of the CCO beyond mere "compliance with laws" – a mandate that may from time to time conflict with that of the GC.<sup>12</sup> Other arguments raised by General Counsels, however, have started to galvanize some in the General Counsel community, and powerful business lobbying and advocacy groups, and center on a perceived threat to a basic corporate protection -- the attorney-client privilege.

As explained in this white paper, the rise of the CCO and ethics and compliance programs is neither a threat to the attorney-client privilege, nor to the corporate standing of General Counsels. To the contrary, a General Counsel and a CCO need each other even more than ever to reinforce and enhance the ultimate success of the legal function, the ethics and compliance program, and the organization itself.

In this context, it is interesting to watch how legal professionals and powerful business and legal advocacy groups are using the issue of attorney-client privilege to suggest that CCOs, or the compliance function, may operate in ways that undermine the ability of a corporation to preserve and maintain the attorney-client privilege.

This debate, which is now playing out in the appeal of the district court decision in *Harry Barko v. Halliburton*,<sup>13</sup> reflects a classic straw man concern that serves only to distract the courts, policymakers and legal and compliance professionals from beginning on a new and more important task: the realignment and redefinition of the respective roles of the independent CCO and the General Counsel, and the development of effective protocols for coordinating the legal and compliance functions.

Unlike those who argue that the sky is falling, and that the attorney-client privilege will forever be eviscerated, this white paper outlines a profound grasp of the obvious – the change in the respective roles of the CCO and the General Counsel require the CCO to define a new relationship designed to promote ethics and compliance while preserving and even enhancing important legal functions, including the attorney-client privilege, needed to ensure that legal advice can be given to the CCO or other executives, where appropriate.

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<sup>12</sup> Donna Boehme, *When Compliance and Legal Don't See Eye-to-Eye*, (May 8, 2014) available at <http://compliancestrategists.com/csblog/wp-content/uploads/2014/05/When-Compliance-and-Legal-Dont-See-Eye-to-Eye.pdf>.

<sup>13</sup> No. 1:05-cv-1276 (D.D.C. Mar. 6, 2014).

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### **II. The Importance of the Attorney-Client Privilege to Legal and Compliance Functions**

The General Counsel is the guardian of legal risks, providing important guidance and functions needed for the company to ensure compliance with the law. A CCO builds on the company's legal compliance foundation, by promoting not only compliance with the law, but adherence to a culture of ethics and a specific business code of conduct – and by finding, fixing and remedying related problems.

One of the General Counsel's most important tools is the attorney-client privilege. It is the means by which the General Counsel encourages full and frank discussions with legal advisors to define legal boundaries, to learn of company operations and potential legal issues, and ultimately, it is a valuable means by which the General Counsel contributes to the company's efforts to detect and prevent legal violations.

A robust and effective attorney-client privilege is critical to a company's ability to detect and prevent potential violations of law. Company actors rely on the privilege as a way to encourage communications on legal issues, to provide sound legal advice, and to promote frank discussions of legal issues. In the absence of such protection, a company's legal officers would be unable to promote and ensure that the company conforms to the law.

The CCO is responsible for implementing and overseeing an effective ethics and compliance program. An effective ethics and compliance program is designed to be open and transparent to employees, management and the government. Companies promote transparency of their ethics and compliance programs to demonstrate strong self-governance, to build cultures of compliance, and to incentivize their employees to engage in the culture, and to come forward with issues that the company needs to address.

A simple analogy may help: the General Counsel defines the lanes in a road; and the CCO is responsible for processes and systems designed to ensure that the corporation stays within those lanes. The CCO should not draw its own lanes defining legal and illegal behavior – that is not the CCO's job. At the same time, the CCO is the independent subject matter expert concerning the broader compliance program, which encompasses much more than just the defined legal lanes.

Compliance officers need the attorney-client privilege for various functions. For example, a CCO's ability to identify potential violations of the law, have them investigated, and then design a remediation plan to fix the identified problem, all depend on the ability of the CCO to operate in close coordination with the legal function, to preserve confidentiality and the attorney-client privilege while the company addresses these important issues.

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On the other side of the equation, CCOs also need to conduct many of their critical functions outside the attorney-client privilege, including audits, monitoring hotlines and complaint processes, conduct of investigations of complaints, training, ethics communications, etc. The vibrancy of an ethics and compliance program depends on the ability of a CCO to communicate and disseminate important compliance values, policies and procedures.

In the end, a compliance program is only as good as it is embraced and embedded within the culture of a company. In this process, there is no room for blanket confidentiality, secrecy and claim of privilege.

### **III. Drawing the Lines between Compliance and Legal: Internal Investigations and the Attorney Client Privilege**

The boundary between the legal and compliance functions is tested in the handling of internal investigations. Every compliance program requires an internal investigation and discipline process to identify potential legal and code of conduct violations, and mete out discipline for violations of law and/or a code of conduct. Many companies have established internal investigation units, either as part of the auditing function or the compliance program.<sup>14</sup> Most of these internal investigation operations coordinate closely with the legal department to ensure that certain internal investigations are conducted under the privilege.

In recent years, litigation of attorney-client privilege claims has increased over access to internal investigation documents and reports. The stakes are high in these situations because disclosure of otherwise privileged documents creates significant litigation risks.

The issue of whether the attorney-client privilege or the work product doctrine applies to documents created as part of an internal compliance investigation is not new or novel.<sup>15</sup> Rather, as the Supreme Court stated in *Upjohn Co. v. United States*, the outcome in any particular circumstance must be determined on a "case-by-case basis" and depends on the particular circumstances of the case.<sup>16</sup>

On May 7, 2014, the D.C Circuit heard an appeal of a *qui tam* whistleblower case *Barko v. Halliburton/KBR*, arising from allegations that KBR engaged in contract fraud in one

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<sup>14</sup> United States Sentencing Guidelines, Section 8B2.1(b)(7).

<sup>15</sup> [\*Upjohn Co. v. United States\*, 449 U.S. 383 \(1981\)](#); [\*Solis v. Food Emp'rs Labor Relations Ass'n\*, 644 F.3d 221 \(4th Cir. 2011\)](#); [\*Permian Corp. v. United States\*, 665 F.2d 1214 \(D.C. Cir. 1981\)](#); [\*Wultz v. Bank of China, Ltd.\*, F. Supp. 2d \\_\\_\\_\\_\\_, 2013 WL 5797114 \(S.D.N.Y. Oct. 25, 2013\)](#); [\*United States v. ISS Marine Servs., Inc.\*, 905 F. Supp. 2d 121 \(D.D.C. 2012\)](#); [\*United States v. Dish Network, LLC\*, 283 F.R.D. 420 \(N.D. Ill. 2012\)](#); [\*In re Intel Corp. Microprocessor Antitrust Litig.\*, 258 F.R.D. 280 \(D. Del. 2008\)](#).

<sup>16</sup> [\*Upjohn\*, 449 U.S. at 396](#).

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of their major Iraqi war contracts. From all angles, this case appears to turn on a simple fact-based question of attorney-client privilege under federal law.

Yet the matter appears to have attracted a mountain of amicus briefs from the likes of the U.S. Chamber of Commerce, the Association of Corporate Counsel and the National Association of Manufacturers, all of which are worried about the ability of companies to conduct internal investigations under the cloak of the attorney-client privilege.

The facts of the case are straightforward. Former KBR employee Harry Barko reported fraud and contracting abuses he believed were committed by KBR in spending the monies it obtained from the U.S. government to pay costs associated with the war in Iraq. He was particularly concerned over KBR's practices in providing large subcontracts to a Jordanian company known as Daoud.

Mr. Barko used the internal reporting procedures established in KBR's Code of Business Conduct ("CBOC") to report his allegations regarding the KBR-Daoud fraud. Consistent with the Code, KBR investigated Mr. Barko's allegations. The company then wrote up internal reports concerning the investigators findings, and thereafter hid the reports from public scrutiny. Nothing was reported to the federal government.

Fast forward approximately ten years later. Mr. Barko, frustrated by his belief that KBR hid evidence of fraud, filed a False Claims Act/*qui tam* legal action in an attempt to hold the company accountable. As part of his lawsuit he asked that KBR produce in discovery the CBOC reports. KBR refused. They claimed that because an attorney managed the CBOC program, the reports were privileged. Barko filed a motion to compel.

In response to Barko's motion the federal judge hearing the case reviewed the CBOC reports *in camera*. The judge described the documents: "*The Court has reviewed KBR's COBC Reports and they are eye-openers. KBR's investigator found Daoud: 'received preferential treatment.' The reports include both direct and circumstantial evidence that Daoud paid off KBR employees and KBR employees steered business to Daoud. And the KBR investigation 'reported a trend that D&P would routinely submit bids after proposals from other companies had been received.' The reports suggest some KBR employee or employees fed information about competitor bids to Daoud to allow Daoud to submit a late bid undercutting the competitors. . . . the reports say Daoud continually received contracts despite terrible completion performance and despite regular attempts to double bill. In one case, KBR gave Daoud a contract despite Daoud's bid being twice another bid from a competent contractor.*"

On March 6, 2014, after conducting his *in camera* review, the judge ordered KBR to produce all of its CBOC reports related to Mr. Barko's allegations.

The district judge explained that the "investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice."



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As a result, the trial judge determined that the investigation was of a “business nature” rather than a “legal nature.”<sup>17</sup>

Significantly, the district court cited the fact that the KBR Code, as approved by the company, did not state that CBOC investigations were confidential or covered under an attorney-client privilege. The Code provided a specific procedure for KBR to invoke an attorney-client privileged investigation. KBR failed to exercise this procedure in Mr. Barko’s case.<sup>18</sup>

KBR’s conducted the investigation without any attention to the attorney-client privilege. For example, KBR investigators failed to advise employees of basic rights as required under *Upjohn*. In addition, the employees who were interviewed were never told: (1) the purpose of the investigation; (2) that the investigation was being conducted under the attorney-client privilege; (3) that KBR retained the privilege and would decide whether or not to waive the privilege; or (4) that they were entitled to representation during the interview.

Faced with the prospect of having to turn over the highly incriminating CBOC reports, KBR filed an “emergency” motion with the U.S. Court of Appeals for the District of Columbia Circuit, seeking interlocutory review of the lower court’s order. KBR claimed that the judge had overstepped well-established legal boundaries by ordering the release of the CBOC reports, and specifically claimed that the court’s order would set precedent that internal investigations conducted pursuant to mandatory government regulations, could not be kept confidential under the attorney-client privilege.

Shortly thereafter business associations aligned with KBR, including the Chamber of Commerce, the National Association of Manufacturers and the Association of Corporate Counsel, submitted an *amicus curie* “friend of the court” brief to the appeals court in support of KBR. These groups warned that any undermining of the ability of corporate General Counsel to keep documents confidential would have a catastrophic impact on the willingness of companies to engage in effective internal compliance activities.

The old legal axiom applies to the Barko case – bad facts make bad law. And the facts for KBR are very bad. KBR failed to take the steps, known to any first year law student, to preserve the attorney-client privilege. KBR’s use of a non-disclosure agreement, as opposed to basic *Upjohn* protections, clearly raised significant issues suggesting that KBR was more interested in preventing disclosure of the facts without seeking to protect the internal investigation by following basic attorney-client privilege procedures.

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<sup>17</sup> *Order* at 5-8.

<sup>18</sup> *Ibid.*



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KBR's sloppy post hoc attempt to rescue the attorney-client privilege claim ignores the overwhelming factual problems with KBR's handling of the internal investigation.<sup>19</sup>

At the time of this article, the Court of Appeals has not decided the *Barko* case. As explained, the Court of Appeals will have a hard time finding that KBR followed any proper procedures in conducting the internal investigation. The mere fact that the results of the investigation were reported to KBR's general counsel is not sufficient, by itself, to uphold the privilege. Such a holding would be contrary to the requirements set forth by the Supreme Court in *Upjohn* and cases decided following *Upjohn*. Whether the trial judge's rationale is upheld will be a closer question since the Court of Appeals may find its own reasoning for rejecting KBR's privilege claims.

The Federal Rules of Civil Procedure "strongly favor full discovery whenever possible."<sup>20</sup> "The purpose of the attorney-client privilege is to encourage open and complete communication between a client and his attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications."<sup>21</sup>

For the privilege to apply, a party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice.<sup>22</sup>

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<sup>19</sup> Regardless of the outcome of the appeal one fact in the case will be hotly contested for some time to come: the legality of the non-disclosure agreement KBR required its employees to sign whenever they provided witness statements under its CBOC program. This non-disclosure agreement, which was heavily relied upon by the district court in ruling that the CBOC investigatory reports were not privileged, placed strict prohibitions on employees. Employees were threatened with discharge if they discussed their fraud allegations with anyone, and were told that disclosures of their concerns could harm KBR's business in the Middle East.

<sup>20</sup> *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).<sup>20</sup> 501 F. Supp. 2d 789, 795 (E.D. La. 2007); see FED. R. CIV. P. 26(b)(5).

<sup>21</sup> See *In re Colton*, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), *affd*, 306 F.2d 633 (2d Cir.1962), *cert. denied*, 371 U.S. 951 (1963) (basis of the privilege is "to encourage clients to make the fullest disclosures to their attorneys, to enable the latter properly to advise the clients"); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950)("To induce clients to make (free and honest] communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity.") (emphasis added); *In re Seroquel Prod. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2008 WL 1995058, at \*2 (M.D. Fla. May 7, 2008) (citing *United States v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990)). The privilege applies only to communications and does not extend to facts. See *Upjohn Co. v. United States*, 449 U.S. at 395-96.

<sup>22</sup> *In re Teleglobe Comm. Corp.*, 493 F.3d 345, 359 (3d Cir. 2007); *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007); *United States v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990).

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“[T]he attorney-client privilege applies to corporations” and protects communications to corporate counsel for purpose of obtaining legal advice.<sup>23</sup> Communications between corporate client and corporate counsel require the proponent to satisfy a “purpose and intent” threshold test. “[M]odern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.”<sup>24</sup>

The privilege also protects “communications between corporate employees in which prior [legal] advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities.”<sup>25</sup> In some cases, the privilege may also be extended to protect “information gathered by corporate employees for transmission to corporate counsel for the rendering of legal advice[.]”<sup>26</sup>

Under controlling law, if the “primary purpose” of the CBOC investigation was to obtain legal advice, the documents could potentially be shielded from review. However, if the “primary purpose” of the investigation was business related, the mere fact that attorneys reviewed the documents or had supervisory responsibilities over the COBC program would not, onto itself, shield the documents from discovery. Unfortunately for KBR, the COBC investigation was conducted without any adherence to the basic procedural requirements dictated by the Supreme Court under *Upjohn* and long-standing precedent.<sup>27</sup>

To deflect attention from KBR’s own procedural missteps and mishandling of the COBC

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<sup>23</sup> *Upjohn Co. v. United States*, *supra*, 449 U.S. at 390. The Court stressed that the privilege allowed corporate counsel to have all the relevant information “to enable him to give sound and informed advice.” *Id.* at 390.

<sup>24</sup> *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007). Simply labeling a document “Confidential – Attorney Client Privilege” is not an adequate basis for legally presuming or even logically assuming a primary legal purpose. *In re Vioxx*, 501 F. Supp. 2d at 797. “The content of the message must request legal assistance, and the information conveyed must be reasonably related to the assistance sought.” Rice, *Electronic Evidence* 260; *Tyne v. Time Warner Entm’t Co.*, 212 F.R.D. 596 n.4 (M.D. Fla. 2002) (the attorney-client privilege “label may serve to put recipients on notice that the document is confidential, but it does not at all prove the existence of privilege.”).

<sup>25</sup> *In re Vioxx*, 501 F. Supp. 2d at 797.

<sup>26</sup> 1 Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 151-52 (5th ed. 2007) (The court, relying on the proposed but never adopted Rule 503(b) of the federal rules, “concluded it was not necessary for the attorney to be either the sender or direct recipient of the privileged communications. The documents at issue were documents gathered to prepare a patent application and forward to patent counsel.”) (citing *In Eutectic v. Metco*, 61 F.R.D. 35, 37 (E.D.N.Y. 1973)).

<sup>27</sup> The COBC investigative forms included no references to the fact that the KBR investigators were reporting to General Counsel, and nowhere on the form were employees informed that the information they were providing would be classified by the company as “attorney client privileged.” *Order* at 5-6.

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internal investigation, KBR is arguing, with the support of powerful business interests, that upholding the trial judge's decision would undermine the ability of companies to conduct internal investigations under the protection of the attorney-client privilege. KBR's argument assumes too much, and ignores the fact that its own procedural missteps have placed it in a situation where they have nothing left to argue but dramatic distractions from basic legal principles. KBR's attempt to expand the "privilege" and keep clearly discoverable information away from the regulators and the public would be contrary to the public interest and to the purposes of the attorney-client privilege itself.

Moreover, KBR's argument would set a dangerous precedent by suggesting that companies will need to conduct more of their compliance operations under the umbrella of privilege. Such a result would run contrary to the important need of compliance programs to be transparent within a company's culture. A compliance program managed purely as an arm of the legal function runs the serious risk of being perceived as, and in fact of becoming, less a means of preventing and detecting misconduct, and instead more of an information-gathering exercise for giving legal advice.<sup>28</sup>

KBR's argument, carried to its logical extreme, would encourage companies to place more of their compliance operations under an umbrella of privilege by returning compliance officers to a place they do not belong – reporting to the General Counsel. This would be an enormous backward step in the development of effective compliance programs, and would have the unfortunate result of increasing privilege claims over routine compliance operations.

KBR maintains that the integrity of corporate compliance programs is threatened by the lower court's disclosure order. However, it is KBR's failure to follow basic procedures that, in the end, have forced KBR to make a dramatic and flawed argument: namely, that the lower court's decision will have disastrous impact on the future ability of corporations to conduct internal investigations under the attorney-client privilege.

### **IV. The Way Forward for General Counsels and Chief Compliance Officers**

Every company needs the attorney-client privilege to promote internal communications on legal issues to ensure legal compliance. Such communications are critical to the General Counsel's ability to promote and ensure a company's compliance with the law.

CCOs carry out their compliance activities with a presumption of transparency and disclosure. After all, the success of a compliance program depends on its visibility within an organization as one important means to communicate and create a culture of integrity. At the same time, a significant benefit of an effective compliance program is being able to share it proactively with regulators and prosecutors when it matters. "Sorry our compliance program is privileged" doesn't quite cut it. Most of the compliance

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<sup>28</sup> See <http://www.corpcounsel.com/id=1202649856926/GM-In-House-Lawyers-Pulled-Into-Ignition-Switch-Probe>

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functions are carried out with this transparency in mind. And, then there is the other legal axiom well known to GCs: “when everything is privileged, nothing is privileged.” This is a warning to those who would argue for a blanket privilege for any part of a compliance program simply due to the fact that it reports to the legal department.

However, when appropriate, strict protection of the company’s attorney-client and work product privileges can be asserted by timely involvement of in-house or outside counsel. As suggested in a widely circulated Ethisphere white paper, “*The Business Case for a Standalone Chief Compliance Officer*”:

Effective programs are thoroughly documented, as are related investigations. Such documentation not only reflects the components of the program in the event of an investigation, but also demonstrates that the company is responding to issues that are reported or discovered by refashioning its internal controls.<sup>29</sup>

So how exactly should legal privilege be addressed in an effective compliance program that is independent from the legal function?

CCOs understand that an important corporate partner is the General Counsel.<sup>30</sup> The ultimate success of a compliance program often depends on this relationship – if they do not get along, the compliance function may be compromised. CCOs and General Counsels need each other and need to recognize this fact. When they do, they can build effective programs to work together when conducting risk assessments, internal investigations, compliance program assessments and evaluations and other sensitive compliance functions. But none of this cooperation and collaboration requires that the CCO report to, or be filtered by, the General Counsel. In fact, a relationship where one party can automatically veto the mandate and judgment of the other party has the opposite effect from collaboration, and deprives the company of an important, independent voice in the C-Suite.<sup>31</sup>

Any compliance project that requires preservation of the privilege can be conducted in a manner that protects the confidentiality and corporate privilege. For instance, the cloak

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<sup>29</sup> <http://m1.ethisphere.com/resources/whitepaper-separation-of-General-Counsel-and-cco.pdf>

<sup>30</sup> CCOs in the SCCE survey view Legal as close and valued allies with whom they enjoy a positive working relationship  
Cited in this Corporate Counsel column:  
[http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202592518804&Making\\_the\\_CCO\\_an\\_Independent\\_Voice\\_in\\_the\\_CSuite#ixzz2YSKRK9sL](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202592518804&Making_the_CCO_an_Independent_Voice_in_the_CSuite#ixzz2YSKRK9sL)

<sup>31</sup> Donna Boehme, *Making the CCO an Independent Voice in the C-Suite*, Corporate Counsel, [http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202592518804&Making\\_the\\_CCO\\_an\\_Independent\\_Voice\\_in\\_the\\_CSuite](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202592518804&Making_the_CCO_an_Independent_Voice_in_the_CSuite).

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of legal privilege is critical in those instances when the company needs actual legal advice, such as when an opinion is necessary to determine whether a company has actually violated the law and advice is needed to help remediate the violation and improve compliance functions. This process requires the participation of in-house or outside counsel. The CCO depends on the legal department in these situations, and should be fully sensitive to the significance of the privilege.

The coordination function is equally important when it comes to responding to a whistleblower complaint and the risk that the whistleblower will report the matter to the federal or state government. The CCO and the General Counsel should work hand-in-hand to address the whistleblower complaint, interact with the whistleblower, and provide assurances to the whistleblower of the company's intention to investigate and remediate any problems that they discover -- a required practice under the amendments to the Sentencing Guidelines.

Any suggestion that CCOs need to continue reporting to the corporate legal department to protect the privilege is not only incorrect, as noted in the Ethisphere white paper, it is "contrary to the goals of an effective compliance and ethics program."<sup>32</sup>

Moreover, it ignores the overwhelming governance trend and the accomplishments of many CCOs and General Counsels who have worked together successfully to carry out their respective responsibilities. Separation of the legal and compliance functions ensures independent and objective legal reviews, and promotes an internal system of checks and balances. What is critical is that the two roles coordinate and work well together by establishing some basic "interface" ground rules and ensuring that their respective mandates are clear, documented, understood by all relevant personnel, and implemented. As many commentators have observed, the two roles are unique, with separate mandates and required competencies, and are ideally carried out by two different people.

In this new and challenging ethics and compliance environment, General Counsels and CCOs need to coordinate and develop specific protocols for identifying potentially significant issues, protecting the company's ability to rely on the privilege, and implementing policies and procedures to ensure that the privilege is maintained, or to review the continuing applicability of the privilege to the specific issue on an ongoing basis. The new protocol for coordination of legal and compliance functions should not be very hard to define but will depend on good faith by the parties to adhere to the standards, communicate with each other as needed, and not use the protocol as a means to manipulate or skew internal politics to either side's benefit. It is a challenge for legal and compliance professionals to work together.

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<sup>32</sup> *Id.* at 8.

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When it comes to internal investigations, with certain exceptions, it is fairly easy to identify those investigations that will require the protection of the privilege. The exceptional cases will require a conservative approach – meaning use of the privilege unless and until a determination is made that the privilege is no longer necessary. Whatever rules are applied, the parties have to ensure consistency and be willing to make adjustments as needed.

The way forward for General Counsels and CCOs requires a distancing from the past – the issue of reporting relationships, supremacy and control are gone. The new era of cooperation is beginning. Let us all hope that like the ending line of *Casablanca*, the new relationship between the General Counsel and the CCO is “the beginning of a beautiful friendship.”