PAUL HASTINGS

STAY CURRENT

May 2020

Follow @Paul_Hastings

Field Code Changed

Field Code Changed

# *Court Bars Inquiry Into Corporate Counsel's Preparation of Former Employees for Deposition*

By Matt Herrington & Alex Schulman

Field Code Changed

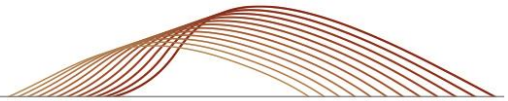
Field Code Changed

The *Upjohn* doctrine typically shields corporate counsel's communications with present employees from disclosure.[1] But what about former employees? Justice Burger's concurrence in *Upjohn* would have applied the holding to current and former employees;[2] in practice, doctrine in the lower courts remains unsettled.

Ruling from the bench in the False Claims Act case *United States ex rel. Howard v. KBR, Inc.*, No. 11-cv-04022 (C.D. Ill.), Magistrate Judge Jonathan E. Hawley denied relators' motion to compel testimony concerning defendant Kellogg Brown & Root's ("KBR") preparation of former KBR employees for deposition.[3] The case, now nearly a decade old, involves allegations that KBR submitted false claims to the Defense Department's procurement agency in connection with a multi-billion dollar contract to provide logistical services to U.S. troops in Iraq and Afghanistan. Judge Hawley allowed relators to ask deponents, broadly, about what sorts of materials they had looked at to prepare for the deposition, but barred any more specific questioning concerning their communications with KBR's lawyers.

Relators argued in their motion to compel that when deposing KBR's former-employee fact witnesses, questions about the nature of their preparatory communications with KBR counsel should be fair game.[4] Relators' theory was that because KBR could present unrepresented former employees as impartial fact witnesses, an inquiry into whether KBR's counsel communicated views about the case and its relevant documents was necessary to evaluate the degree of influence KBR potentially exercised over witnesses and by extension witness credibility.[5] In relators' view, then, KBR may now claim privilege vis-à-vis former employees only for "communications relat[ing] to privileged employee-counsel communications that occurred *during* the employment relationship."[6]

KBR countered that the Burger concurrence's extension of the *Upjohn* privilege to former employees had effectively been adopted by most lower courts. In fact, only the Fourth and Ninth Circuits have explicitly applied *Upjohn* to former employees.[7] And while district courts have, as KBR argued, generally affirmed the extension, there remain caveats and open questions.[8] For example, one Connecticut case (cited as authority by both relators and KBR) held that *Upjohn* applied to communications with former employees only insofar as they "relate to . . . conduct and knowledge, or communication with defendant's counsel, during . . . employment" but then also suggested that work product privilege might extend to some set of "conclusions or opinions" expressed by counsel while preparing a formerly-employed deponent.[9] Left unclear was how to distinguish these protected



communications from others that could be unprotected because of their "potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously."[10]

Corporate counsel should be aware that although communications with former employees during deposition preparation are likely to be held privileged, either under an attorney-client or work product theory, this is by no means a settled question. Counsel should be attentive from the outset to whether there is precedent on this question in the relevant jurisdiction.

✧ ✧ ✧

*If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Washington, D.C. lawyers:*

Matt Herrington
1.202.551.1820
mattherrington@paulhastings.com

Alex Schulman
1.202.551.1911
alexschulman@paulhastings.com

Field Code Changed

Field Code Changed

[1] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[2] *Id.* at 402-403 (Burger, J., concurring in part and concurring in judgment).

[3] *See* Dkt. 196.

[4] *See* Dkt. 187 at 2 ("KBR cannot use the veil of attorney-client privilege and work-product protection to prevent Relators from testing the credibility and source of knowledge of unrepresented, non-party witnesses.").

[5] *See id.* ("If KBR does not represent its former employees but nonetheless shapes their testimony through deposition preparation, Relators must be allowed to discover the scope of that influence.").

[6] *Id.* at 14 (emphasis in original).

[7] *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997); *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981).

[8] *Compare Hanover Ins. Co. v. Plaquemines Par. Gov't*, 304 F.R.D. 494, 498–99 (E.D. La. 2015) (deeming it "clear to this Court that *some* privilege exists between counsel for a corporation and former employees of the corporation" (emphasis in original)) *with Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (concluding "that counsel's communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witness.").

[9] *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41-42 (D. Conn. 1999).

[10] *Id.* at 41.

Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2020 Paul Hastings LLP.