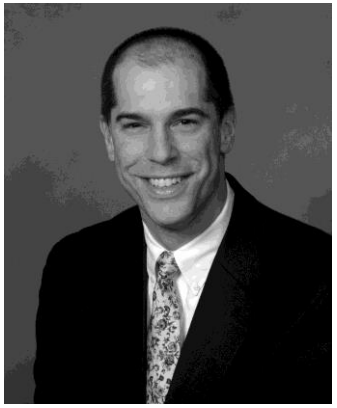
Mandatory Disclosure Rule Update



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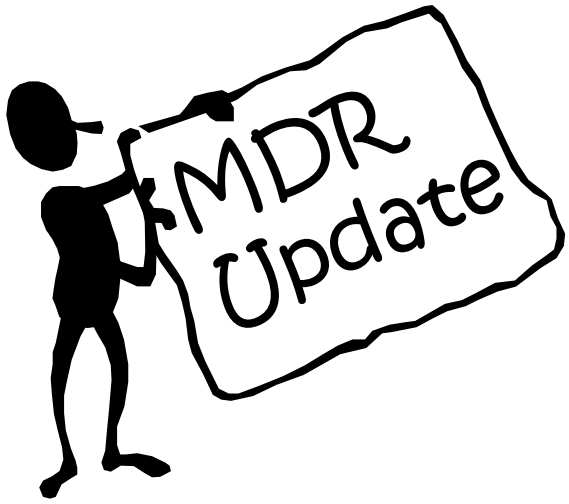
Today's Topics

- Movie Clip about Government Contracting
- MDR Background
- MDR Current Issues
- *Saunders v. Unisys*
- *Barko v. KBR*



Myth Busters about Hamlet

- “To Be or Not To Be” Soliloquy is not what you think it is.
- Branagh managed to find the original folio for Hamlet, which had the Government Contracts language.
- Ancient Language: Here are some definitions.
- “CDA” is Contracts Disputes Act
- “OIG” is Office of Inspector General

Hamlet's MDR Soliloquy: To Tell or Not To Tell

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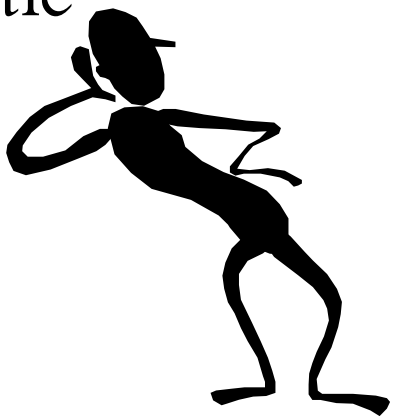
Mandatory Disclosure Rule (MDR)

- How it is working in practice, after 5 years.
- Relationships with DoD; DOJ; othere OIGs
- GSA OIG statistics:
  - 134 Disclosures: 81 closed, 53 open
  - Recovered $47M

Recently Overheard . . .

- **Reporter**: "Does the . . . rule foster a more open relationship between the government and its suppliers?"

- **GSA IG**: "Exactly. That's why I like it a lot. It does create some trust. It establishes us as partners, and contractors get to see where we're coming from, and we get to see a little bit more where they're coming from."



MDR BACKGROUND

History

- Pre-2008
  - Voluntary disclosures were the law of the land
  - DOJ felt the voluntary disclosure program was a failure
- November 12, 2008
  - Rule published
- December 12, 2008
  - Rule became effective
- December 2013
  - Five Year Anniversary

Three Overlapping Rules

- Suspension/Debarment Disclosure Rule
  - FAR Part 9
- FAR Disclosure Clause
  - FAR 52.203-13(b)
- Internal Control System (ICS) Disclosure Rule
  - FAR 52.203-13(c)

FAR 52.203-13

- (3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—
  - (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
  - (B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

The Text (FAR Part 9)

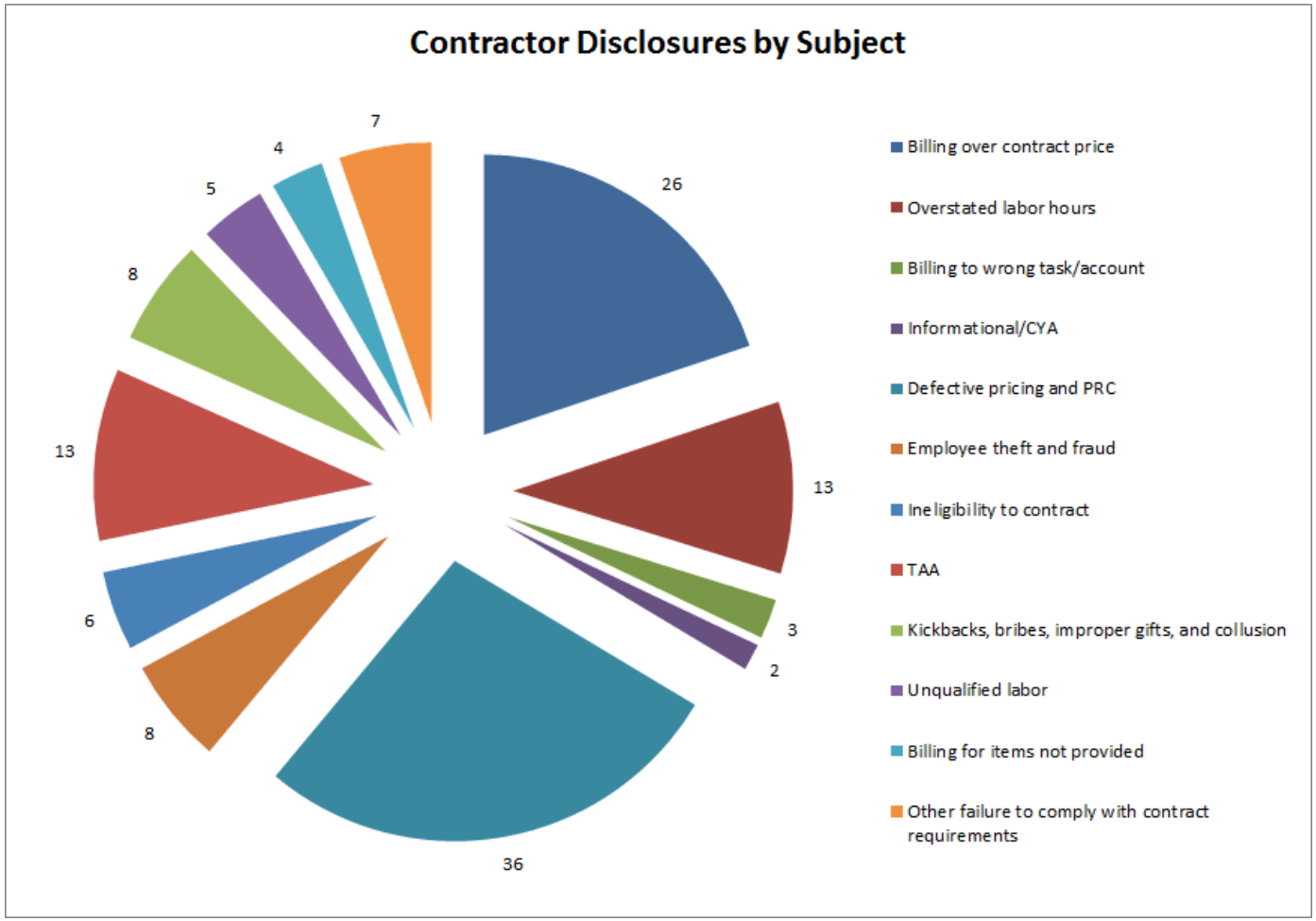
- Knowing failure by a principal, until 3 years after final payment on any Government contract, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or subcontract, credible evidence of –
  - Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
  - Violation of the civil False Claims Act; or
  - Significant overpayment(s) on the contract, other than overpayments resulting from contract finance payments as defined in FAR 32.001.

MDR CURRENT ISSUES

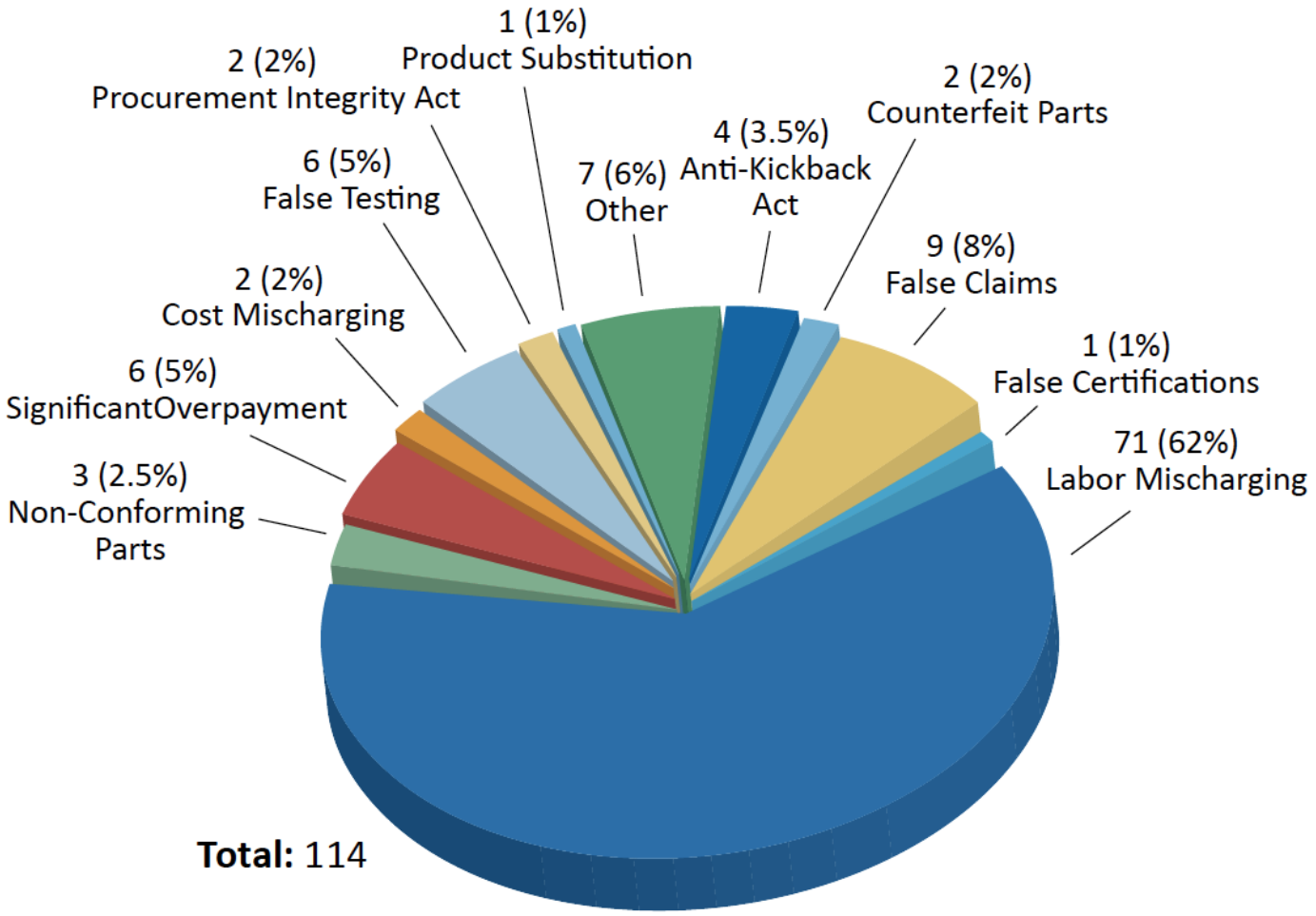
Where We Are Now?

- MDR has not opened the disclosure floodgates
  - DODIG: Most (114 in most recently reported 6 months)
  - GSAIG: Second most (131 in total as of April 2014)
  - Other: de minimis
- Resolution process has slowed
- Contractors have been held accountable for non-disclosures
  - Inchcape Shipping
  - Booz Allen
- Government **considering** changes to MDR

GSA OIG (through March 2014)



DOD IG (4/13 – 9/13)



How Are Disclosures Being Handled by the Government?

- DOD
  - Copies to all DOD stakeholders, including DCAA and cognizant SDO
  - Cognizant agency (e.g., CID, NCIS) takes lead
  - DOJ gets a copy of all disclosures
  - All disclosures from “Top 100” defense contractors go to DCIS
- GSA
  - GSA OIG investigations section handles all investigations
  - DOJ gets a copy of all disclosures

Government Handling (continued)

- All disclosures being audited/investigated to some extent, but some simply to ensure accurate/complete repayment
- DOD/GSA OIG working together on multi-agency disclosures
- DCAA aggressively inserting itself into process wherever possible
- AUSAs taking over cases even where no FCA violation

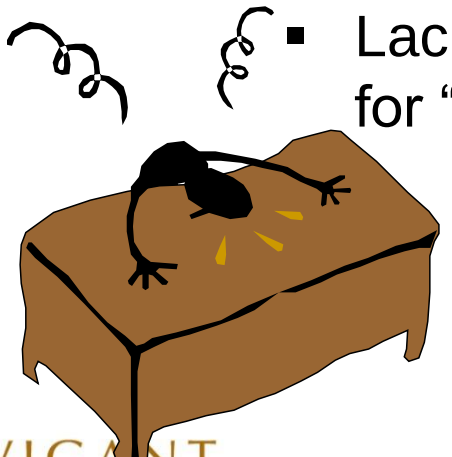
MDR Frustrations

OIG Frustrations

- Lack of detail in disclosures
- Calling everything an "overpayment" issue
- Failure to provide and live up to timelines
- Lack of cooperation re productions/witnesses

Contractor Frustrations

- Hijacking of MDR process by USAO
- Overly aggressive nature of DCAA
- Lack of clarity in rules/definitions (e.g., "credible evidence")
- Lack of clear exception for "minor mischarging"



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Full Cooperation (52.203-13)

- "Full cooperation . . . Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' **and investigators' request for documents and access to employees with information**"
  - Commentary states that contractors must "encourage" their employees to meet with the OIG

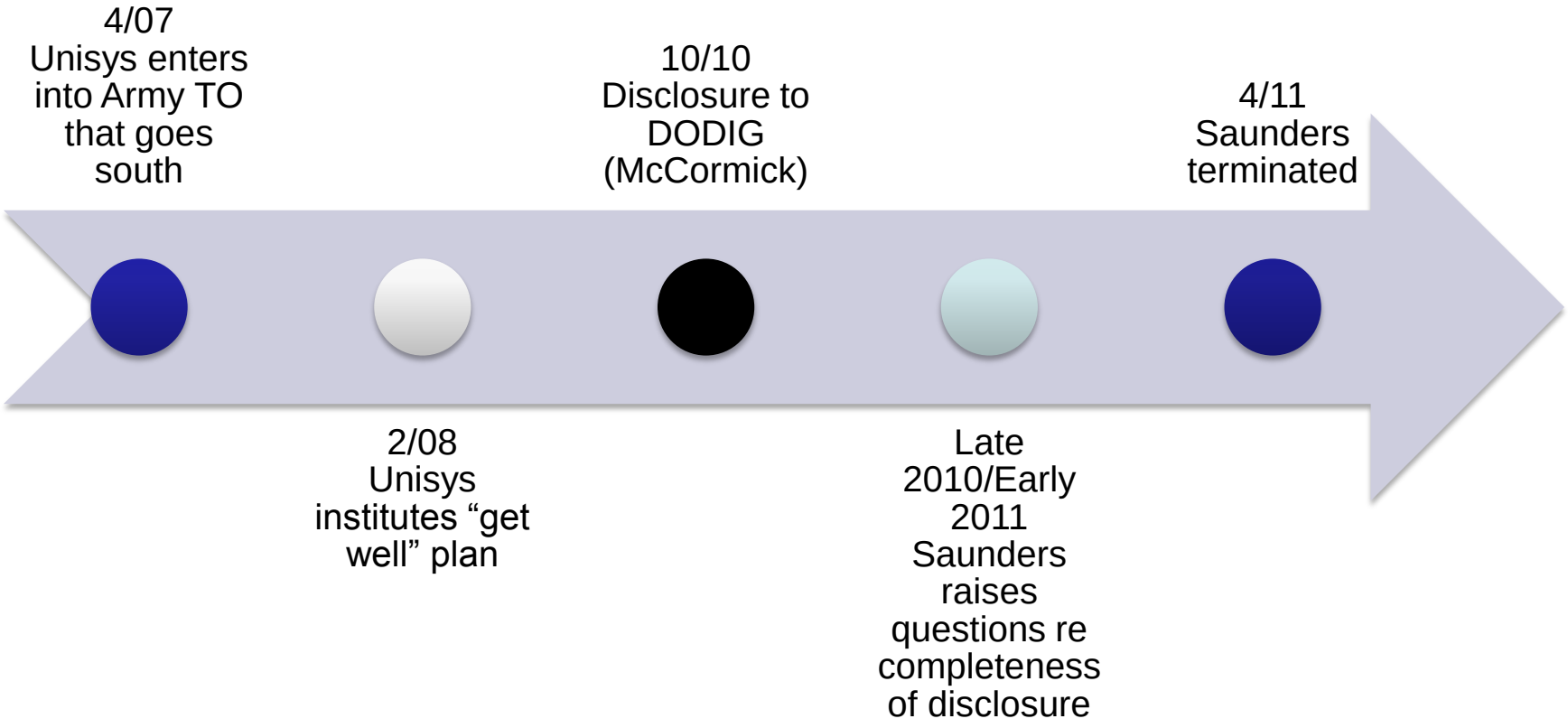
SAUNDERS V. UNISYS

The FAR Council's Crystal Ball

- "Several respondents suggest that a contractor making a mandatory disclosure of a violation of the federal civil FCA risks prompting a potential relator to file a qui tam suit based on the disclosure, and note that the public disclosure bar under existing law likely would not bar such a suit. . . ."

- "Response: The Councils recognize that mandatory disclosure of a violation of the civil FCA presents a risk that a qui tam action will follow. . . ."

Saunders Background



Saunders Background (continued)

- Public Disclosure Bar (PDB) precludes qui tam suits based upon information already publicly disclosed
- Following an internal investigation, Unisys made a disclosure to DODIG
  - Disclosed “unacceptable” billing practices
- Unisys employee (the one who handled the disclosure) then filed a qui tam case
  - Claimed key facts not disclosed in disclosure
- Unisys moved to dismiss on PDB grounds

Public Disclosure Bar

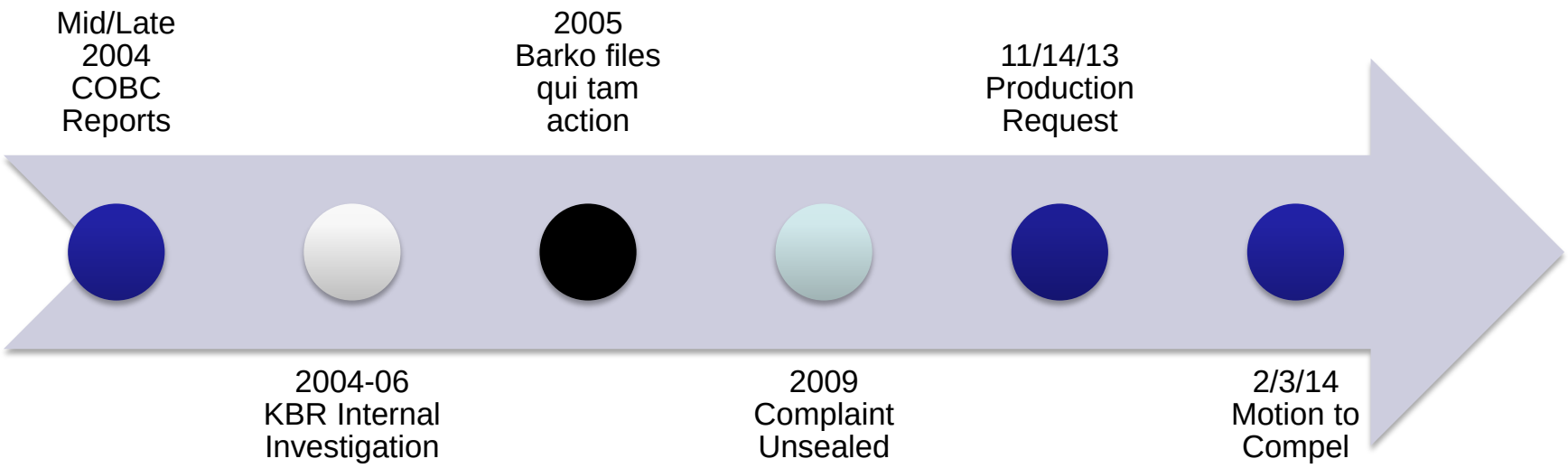
- Court recognized Circuit split
  - Some say disclosure must put evidence in public domain
  - Some say disclosure to a competent public official is enough (Seventh Circuit)
- EDVa rejected 7th Circuit rule
  - Disclosure to DODIG NOT enough to invoke PDB
- EDVa ruling based upon two facts
  - Disclosure only to DODIG, not to general public
  - Disclosure failed sufficiently to disclose transactions of fraud (*i.e.*, the false statement alongside the true statement)

Lessons Learned

- Recognize MDR disclosure may not preclude qui tam suit
  - Unfortunate, but not a surprise
- Ensure adequate detail in MDR disclosure
  - Clear best practice
- Consider actual public disclosure in appropriate cases
  - Double-edged sword
- Don’t retaliate against the one who brings the wrongdoing to the company’s attention
  - No brainer

BARKO V. KBR

Barko Background



KBR COBC Process

- Report received via various internal channels
- Report routed to Director of COBC
- Director decides whether to open investigation
- COBC investigators interview personnel, review documents, obtain witness statements
- COBC writes report
- Report transmitted to Law Department

Attorney Client Privilege

- Designed to “encourage full and frank [attorney/client] communication”
- Communication must be “for the purpose of securing *primarily* either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding.”
- To show primary purpose, DCDC held party must show “communication would not have been made ‘but for’ the fact that legal advice was sought.” [*Key issue on appeal*]

Attorney Work Product

- Protects attorney's mental impressions, conclusion, opinions, or legal theories prepared in anticipation of litigation
- "Because of test": Was document prepared *because of* the prospect of litigation?
- Lawyer must at least have subjective AND objectively reasonable belief litigation is a real possibility

Bad Facts Make Bad Law

- KBR COBC investigation was a *routine*, *ongoing*, compliance investigation *required*
- Investigation not conducted by attorneys
- Interviewers were non-attorneys
- Report writers were non-attorneys
- No meaningful attorney oversight
- Outside counsel brought in only at end of process

Bad Facts Make Bad Law (cont)

- No documents reflect legal advice being requested or offered
- COBC report does not identify legal issues for further review or request legal advice
- Interviewees never informed purpose of interview was to help KBR secure legal advice
- Investigation conducted well before unsealing of *qui tam* complaint and report written when no litigation had been filed
- KBR "confidentiality agreement"
  - Did not mention purpose was to secure legal advice
  - Focused on "adverse business impact"
- KBR put contents of COBC reports in play by arguing it conducted COBC investigation and made no report

DCDC Holding

- Neither ACP nor WPD protects the COBC documents
- "COBC investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice."
- Government regulations required KBR to investigate
- KBR policies "merely implement" applicable regulatory requirements
- Thus, no privilege

DCDC Dicta

- The Court's finding "was not a close question"
- "KBR's fear of producing the documents is understandable. . . ."
- The withheld reports were "eye-openers" with respect to KBR's liability
- "KBR filed a motion for summary judgment . . . , but KBR's COBC business documents are replete with contrary evidence. . . ."
- "In its [MSJ], KBR makes factual representations directly opposite its own COBC reports. . . ."

Appeal

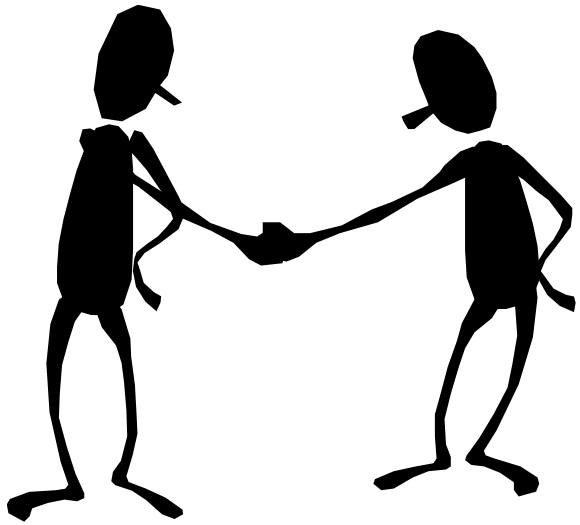
- DCDC denied KBR's motion for interlocutory appeal
- KBR filed mandamus petition with DC Circuit
  - Extraordinary relief
  - KBR argued DC decision would be "death knell" for *UpJohn*
- Amicus briefs filed by multiple parties
- Oral argument heard 7 May
- Circuit focused on mandamus issue and substance
  - Circuit expressed skepticism toward DCDC decision
  - Much focus on DCDC use of "but for" test
  - Much focus on propriety of mandamus action

From *UpJohn*

- "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. . . ."

From The FAR

- FAR 52.203-13: "'Full cooperation'. . . does not require . . . a Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine . . . ."



From the MDR's Preamble

- "One respondent recommended addition of strong language to preserve privilege protections. . . ."
- "DoJ and OIGs proposed that the final rule state explicitly: 'Nothing in this rule is intended to require that a contractor waive its attorney-client privilege . . . ."
- "Response: It is doubtful any regulation or contract clause could legally compel a contractor or its employees to forfeit these rights. . . ."

Barko Lessons Learned

- Company policy/process should distinguish between role of ethics team and legal team
  - And process should be followed consistently, with deviations being documented
- Companies with COBC-type reporting process should consider involving an attorney in initial triage function
- Business team should provide *UpJohn* request to Law Department
- Possibility of litigation should be addressed in kick-off documents
  - And readdressed in subsequent documents

Lessons Learned (continued)

- Kick-off documentation should identify clearly the reason for and nature of the investigation
- Law Department should run a privileged investigation
- Lawyers should conduct interviews where possible
- Witnesses should be given clear *UpJohn* warning
  - Fact warning was given should be documented in writing
- Non-lawyers should be deputized clearly in writing by Law Department with clear instructions

Lessons Learned (continued)

- Communications to witnesses and business personnel should identify privileged nature of investigation
- All documents should be marked properly with appropriate privilege legend
  - Markings should NOT be overused
- All privileged investigation reports should be directed to and addressed to the Law Department

Thank you!

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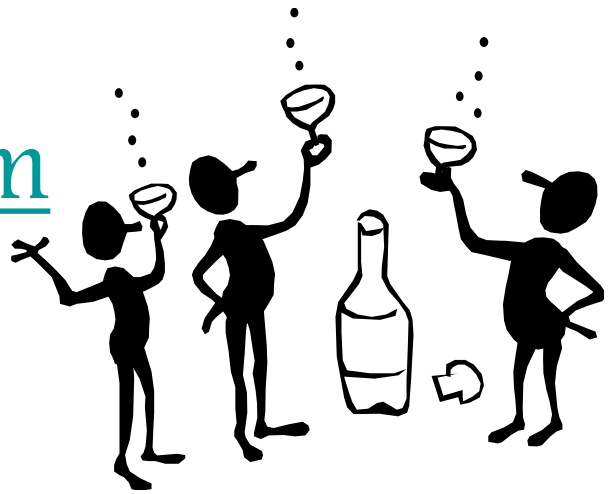

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