

Beefing Up “Corporate Miranda Warnings”

Averting Misunderstandings & Detrimental Consequences in Internal Investigations

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When attorneys interview employees in connection with an internal corporate investigation, lack of clarity concerning who is representing whom can spawn an “ethical mine field.”¹ Failure to negotiate this mine field can result in dire consequences for both a corporation and its counsel. In recent cases, federal courts have underscored the importance of taking appropriate steps to clarify the attorney-client relationships at stake in internal investigations. One federal court has gone so far as to refer outside counsel to the State Bar for disciplinary proceedings.²

Accordingly, it may no longer suffice for attorneys conducting internal investigations to rely solely on verbal warnings—known as “*Upjohn* warnings” or “corporate *Miranda* warnings”—as had been standard practice since 1981, when the U.S. Supreme Court issued its decision in *Upjohn Co. v. United States*.³ Given the

recent judicial emphasis on unambiguous admonitions to corporate employees, it now behooves counsel to consider going beyond mere verbal warnings in internal investigations. Some of the additional steps corporate counsel should consider include: expanding and standardizing the language of *Upjohn* warnings; clearly memorializing and documenting all communications regarding the role and scope of any representations; and—under certain circumstances—supplementing verbal warnings with written acknowledgements and signed waivers. Taking these steps will

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promote clarity and protect the corporation and its counsel. The obvious downside risk of beefed-up *Upjohn* warnings is a possible chilling effect on employees' cooperation with internal investigations. In light of the potentially detrimental consequences of a misunderstanding, this is a risk that may well be worth taking until courts provide further guidance.

Upjohn Warnings and the ABA Model Rules

In *Upjohn*, the U.S. Supreme Court held that so long as certain conditions are met, the attorney-client privilege protects corporate communications irrespective of the level or title of the employee involved in the communication with counsel.⁴ The Court made clear, however, that the privilege belongs to the corporation as an entity, not to any of its agents in their personal capacities.⁵ Thus, when officers and employees reveal confidences to corporate counsel for the purpose of facilitating counsel's provision of legal advice to the corporation, these confidences are protected only as long as—and to the extent that—the corporation wishes to invoke the privilege.⁶ To the extent that a corporation chooses to waive the privilege at a later date, the employee involved in the communication generally cannot prevent disclosure.⁷ In other words, control of the privilege rests with the corporation.⁸

The *Upjohn* Court did not directly discuss the issue of warnings. In the wake of the *Upjohn* decision, however, the American Bar Association (ABA) enacted model rules imposing on attorneys affirmative obligations to clarify their roles in certain circumstances. To date, all but three states have adopted the ABA's model rules.⁹

First, ABA Model Rule 1.13(f) requires a lawyer for an organization to “explain the identity of the [lawyer's] client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.” The official commentary to this model rule recommends that a company attorney, when interviewing a company employee, make clear that “the lawyer for the organization cannot provide legal representation for that constituent individual, and that discus-

sion between the lawyer for that organization and the individual may not be privileged.”¹⁰

Second, ABA Model Rule 4.3 requires attorneys, when dealing with unrepresented persons, to clarify ambiguities concerning representational scope. When an attorney “knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”¹¹ Further, the rule cautions that the attorney should provide no legal advice to the unrepresented individual except advice to obtain counsel.¹²

As a result of *Upjohn* and the resulting ABA model rules imposing on attorneys certain burdens of clarification, corporate counsel began delivering *Upjohn* warnings as a matter of course before employee interviews. Although expressed in different ways, the warning has generally been orally conveyed and has consisted of the following admonitions:

1. Counsel represents the company—not the employee—and is interviewing the employee to gather information in order to provide legal advice to the company;
2. The interview is confidential and covered by the attorney-client privilege;
3. The privilege belongs to and is controlled by the company;
4. Because the company—not the employee—owns the privilege, the company, but not the employee, may elect in the future to waive any privilege and provide information derived from the interview to third parties, including prosecutors or regulators.

A critical function of the *Upjohn* warning is to ensure not only that the attorney-client privilege attaches to the interview, but also that the corporation retains exclusive control of that privilege. Some courts “have been willing to allow corporate employees to assert a personal privilege with respect to conversations with corporate counsel, despite the fact that the privilege generally belongs to the corporation.”¹³ Employees, however, bear a heavy burden in making such a claim and are generally unsuccessful.¹⁴

Recent Legal Developments

In *In Re Grand Jury Subpoena*,¹⁵ the Fourth Circuit recently underscored the importance of clarity in issuing *Upjohn* warnings. During an internal investigation at AOL Time Warner, in-house attorneys had given three employees a standard *Upjohn* warning, but had also indicated that unless and until the parties' interests diverged, the attorneys "could" represent the employees as well. AOL Time Warner subsequently waived the privilege over statements the employees made to in-house counsel during witness interviews. The employees, however, tried to retain the privilege, contending that the attorneys' statement that they "could" represent the employees as well constituted a basis to keep the conversations privileged.

The Court of Appeals ruled against the employees and validated the company's waiver of privilege. The court reasoned that because the attorneys had stated "we *can*" rather than "we *do*" represent the employee, their statements did not create an attorney-client relationship between attorney and employee, and accordingly the privilege belonged exclusively to AOL, not the individual employees.¹⁶ The court further noted the "legal and ethical mine field" that can result when attorneys undertake to represent both employee and company.¹⁷ The court explicitly opined that *Upjohn* warnings should be strengthened, not weakened, in light of the obvious ethical concerns.¹⁸

In a more recent case, a federal judge held that under certain circumstances, a mere verbal *Upjohn* warning does not suffice. In *United States v. Nicholas*, a federal securities-fraud prosecution, Judge Cormac J. Carney suppressed all statements made by the Chief Financial Officer (CFO) of Broadcom to outside counsel during an internal corporate investigation.¹⁹ Despite evidence that the attorneys had given the CFO a verbal *Upjohn* warning, the court ruled that counsel should have obtained from the CFO written acknowledgment that counsel might disclose the content of the interview to such third parties as auditors and federal prosecutors.

Because the law firm conducting the internal investigation for Broadcom had also been representing the CFO in his personal capacity, the court found that the firm breached its duty of

loyalty to the CFO when it (1) failed to obtain the CFO's informed written consent to its simultaneous and adverse representation of both the CFO and Broadcom; (2) interrogated the CFO for the benefit of Broadcom; and (3) disclosed the CFO's privileged communications to third parties without his consent. Judge Carney further found counsel's actions to constitute "ethical misconduct" worthy of State Bar disciplinary proceedings.

It remains to be seen whether the *Nicholas* decision heralds a new requirement of written *Upjohn* warnings and waivers in all circumstances. A unique feature of that case was the law firm's simultaneous representation of both Broadcom in the internal investigation and the CFO in his personal capacity in other matters. On the other hand, Judge Carney's ruling suggests that had the interviewing attorneys obtained certain written acknowledgements and waivers from the CFO, they might not have found themselves in their current predicament.

In another case involving alleged ambiguity concerning who was representing whom, a former employee of the Stanford Group recently lodged a malpractice complaint against her former employer's outside counsel. In *Pendergest-Holt v. Sjoblom*, the employee claimed that counsel never disclosed that he represented only the company, allegedly causing her to misunderstand counsel's role and inducing her to give sworn testimony that resulted in her facing criminal prosecution for obstruction of justice.²⁰

According to the complaint, the employee was led to believe that counsel to the Stanford Group also personally represented the employee in connection with her testimony to the Securities and Exchange Commission (SEC). The complaint alleges that counsel did not inform her (1) of the need to hire independent counsel to protect her personal interests; (2) that her interests and those of the Stanford Group were adverse; (3) that she was not required to testify and that by testifying she was potentially subjecting herself to criminal liability; or (4) that conversations between her and counsel were not privileged. Accordingly, the complaint alleges, the employee testified before the SEC against her own interests. Following her SEC testimony, a federal grand jury indicted the employee on charges of obstruction of justice for

allegedly testifying falsely.²¹ The criminal charges remain pending.

As both the *Nicholas* and *Pendergest-Holt* matters demonstrate, the practice of delivering *Upjohn* warnings only orally—and without standardized language, memorialization or written acknowledgements—could result in misunderstandings that inure to the detriment of all concerned. Inasmuch as the interests of a company and individuals associated with the company frequently end up at odds, it is increasingly important for all parties clearly to understand the precise scope of company counsel's representation.

New ABA Proposed Rules

The ABA has drafted a new set of “best practices” to address the increasingly-common question associated with the attorney-client privilege and internal investigations: How should counsel give *Upjohn* warnings? The ABA's proposal for expanding *Upjohn* warnings—which are presently only in draft form and remain a work in progress—include the following recommendations:

- *First*, counsel should provide the warnings to the “Constituent” (defined as corporate officers, employees, shareholders, directors and trustees) before the interview is conducted.
- *Second*, counsel should orally deliver the *Upjohn* warnings to the Constituent, employing a written script to ensure that the warnings are consistently and accurately given in each interview.
- *Third*, the warnings should include at least the following: (1) that the attorney represents the corporation and does not represent the employee personally; (2) that the communications between the attorney and the employee are privileged; (3) that the privilege belongs solely to the corporation, which may in its discretion choose to waive the privilege and disclose the communications to third parties; (4) that so long as the privilege attaches, the employee may not disclose the communications to any third parties.
- *Fourth*, counsel should make a record that the warnings have been provided through, at minimum, handwritten notes or the cre-

ation of a contemporaneous memorandum of the interview. Counsel may wish to consider supplementing oral warnings by giving the Constituent *Upjohn* warnings in writing and having the Constituent sign a written acknowledgment of the warnings.

Considerations and Consequences

Corporations now face two competing sources of pressure. On the one hand, in the current economic and political climate, corporations face ever more regulatory and enforcement scrutiny. The ability to waive privilege over information acquired during internal investigations is a powerful bargaining chip for corporations in their negotiations with enforcement agencies. Therefore, companies have a huge incentive to seek out as much information as possible from their employees, and an equal incentive to retain exclusive control over that privilege. On the other hand, companies now have a countervailing incentive to deliver extensive warnings to employees, running the risk of chilling employees' cooperation with internal investigations. Compounding this dilemma is the reality that any adversity between a corporation and an employee is often not readily apparent until far later in an investigation.

Until courts provide further guidance, attorneys conducting internal investigations are advised to err on the side of caution when interacting with and interviewing their clients' employees. Standardized *Upjohn* warnings, contemporaneous memorialization of meetings and even written acknowledgements may eventually become standard practice. Whatever the precise content and manner of the warnings in-house and outside counsel choose to utilize, the warning should serve at least the following purposes: clarifying exactly what counsel's role is; specifying whom counsel does and does not represent; and explaining ownership of and control over the attorney-client privilege. Even as enhanced *Upjohn* warnings could well stifle the flow of information from employees to company counsel, such warnings could go a long way toward averting many potential ethical and legal land mines. By successfully traversing the “ethical mine field” of ambiguity concerning exactly whom counsel is representing, corporations can enjoy some degree of certainty

they may continue to control the attorney-client privilege, and also that the information they garner during an internal investigation will, in fact, be available to the corporation when it needs to make use of it.

NOTES

1. *In re Grand Jury Subpoena: £Under Seal*, 415 F.3d 333, Fed. Sec. L. Rep. (CCH) P 93,293 (4th Cir. 2005).
2. *U.S. v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009).
3. *Upjohn Co. v. U.S.*, 1981-1 C.B. 591, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584, Fed. Sec. L. Rep. (CCH) P 97817, 1980-81 Trade Cas. (CCH) ¶ 63797, 81-1 U.S. Tax Cas. (CCH) P 9138, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101, 47 A.F.T.R.2d 81-523 (1981)
4. *Upjohn*, 449 U.S. at 395-397.
5. *Upjohn*, 449 U.S. at 389-392.
6. *Upjohn*, 449 U.S. at 389-392.
7. *Upjohn*, 449 U.S. at 389-392.
8. *Upjohn*, 449 U.S. at 389-392.
9. See ABA's state-by-state survey, available at http://www.abanet.org/cpr/mrpc/alpha_states.html.
10. Model Rules of Prof'l Conduct R 1.13 cmt. 10 (1983).
11. Model Rules of Prof'l Conduct R 44.3 (1983).
12. Model Rules of Prof'l Conduct R 44.3 (1983).
13. *U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 119 F.3d 210, 215, 155 L.R.R.M. (BNA) 3012, 134 Lab. Cas. (CCH) P 10052 (2d Cir. 1997).
14. *In re Grand Jury Proceedings, Detroit, Mich.*, Aug. 1977, 434 F. Supp. 648, 650, 2 Fed. R. Evid. Serv. 689 (E.D. Mich. 1977), judgment aff'd, 570 F.2d 562 (6th Cir. 1978).
15. *In re Grand Jury Subpoena: £Under Seal*, 415 F.3d 333, Fed. Sec. L. Rep. (CCH) P 93,293 (4th Cir. 2005).
16. *In Re Grand Jury Subpoena*, 415 F.3d at 340.
17. *In Re Grand Jury Subpoena*, 415 F.3d at 340.
18. *In Re Grand Jury Subpoena*, 415 F.3d at 340.
19. *Nicholas*, 606 F. Supp. 2d 1109.
20. *Pendergest-Holt v. Sjoblom*, No. 09-CV-00578-L (N.D. Tex. dismissed Apr. 10, 2009).
21. *United States v. Stanford et al.*, No. 09-CR-00342-2 (S.D. Tex.).