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*I am Not Your Lawyer: Best Practices Concerning  
Upjohn Warnings in Corporate Internal Investigations*

# **Avoiding The Perils and Pitfalls of Internal Corporate Investigations: Proper Use of *Upjohn* Warnings**

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For corporate counsel, it remains one of the hottest subjects in town. What kind of warnings to corporate employees will satisfy a lawyer's ethical obligations to ensure that he zealously represents a corporate entity without misleading its employees and officials? Several recent high-profile cases highlight the tightrope that counsel for a corporation must walk. Lawyers retained by companies to conduct internal investigations must protect the best interests of the entity they represent. To do this, they must conduct confidential interviews of key insiders. Yet, after they conduct these interviews, there is no guarantee to the employee that the information will remain confidential.

If the lawyers discover evidence of misconduct, the company may decide that it is in its best interest to come forward and disclose the matter to government authorities, even though doing so means turning over statements from employees and thereby placing them at risk. Recent cases highlight the peril to company counsel who fail to appreciate the potential conflicts they face. When properly given, so-called *Upjohn* warnings can assist counsel in meeting their ethical responsibilities when conducting internal investigations. Yet, from the recent controversy in the Stanford Financial investigation to the complications in the Broadcom cases, it is clear that lawyers still struggle with their role in investigating corporate misconduct and have not yet mastered the use of *Upjohn* warnings to avoid crippling conflicts of interest.

#### **A. The Potential for Conflict in Internal Corporate Investigations**

Let's start with the basics. Lawyers who conduct internal investigations of companies represent the entity, not individual employees.<sup>1</sup> In many cases, the individual employees may not have counsel at the time of the investigation. Employees may believe that their interests are aligned with the company's interests, they may be concerned about the appearance of being individually represented, or the internal investigation may have begun before the need for separate counsel becomes apparent. In any case, corporate counsel tasked to evaluate what, if any, misconduct occurred at the company ordinarily must interview employees regarding their conduct. And that is where the conflict is likely to develop. Lawyers will have the conflicting duty to help the organization ferret out the misconduct by obtaining information from the employees by conducting interviews that are covered by the company's attorney-client privilege. However, if those employees think that the lawyer also owes to them a duty of confidentiality or loyalty, the employees may believe the lawyer has breached such duties if and when the company discloses its wrongdoing to the government in an effort to cooperate and gain leniency.

## **B. *Upjohn* Warnings**

In *Upjohn v. United States*,<sup>2</sup> the Supreme Court laid the foundation for warnings to employees when they are being interviewed in an internal investigation. Writing for the Court, Justice Rehnquist held that communications between company counsel and employees of a company are indeed privileged, and finding the narrow “control group” test used by the Court of Appeals inconsistent with the rationale underlying the privilege of encouraging the candid exchange of information with counsel. However, the privilege recognized by the Court in *Upjohn* belongs to the company, not the individual employee. Therefore, individual employees remain at risk that the company will waive the privilege and share the results of the investigation, including the potentially incriminating statements from employees, with government investigators.

Because of this risk to individual employees who cooperate in internal investigations, corporate counsel and outside counsel retained to conduct internal investigations must warn their interviewees that statements they make are subject to disclosure if the corporation decides to waive the privilege as to the statements. These warnings have come to be known as *Upjohn* warnings.<sup>3</sup>

At a minimum, a proper *Upjohn* warning informs the interviewee that: (1) the attorney is there to conduct a privileged and confidential interview of the employee; (2) the attorney represents the company, not the individual; (3) the company, not the individual, enjoys an attorney-client privilege with the attorney; and (4) the company may, as it sees fit, disclose the employee’s information and statements to third parties, including the government.

Yet, recent cases have called into question whether these warnings alone are sufficient to avoid a conflict of interest for the investigating counsel. Judges are now calling lawyers to task

on whether they complied with their ethical obligations and specifically how and when they administered the *Upjohn* warnings. Judges have recognized that counsel must walk a fine line when giving *Upjohn* warnings. Emphasizing too strongly that the individual employee's interests may conflict with those of the company may discourage employees from cooperating. However, if counsel does not explain the potential conflict sufficiently, the employee might later claim that she believed her statements were privileged and did not knowingly and voluntarily agree that the statements could be disclosed to the government. In short, employees who believe that the company has "thrown them under the bus" may well claim that they were misinformed about the terms governing their interviews with the company's lawyers.

### **C. The Lessons of Broadcom**

Some distinguished lawyers and law firms are now having to defend themselves after failing to appreciate the potentially conflicting roles they were playing in conducting investigations. Consider, for example, the grueling experience of Irell & Manella ("Irell") lawyers who found themselves under attack by United States District Judge Cormac J. Carney for breaching their duty of loyalty to William Ruehle, former Chief Financial Officer of Broadcom Corp.<sup>4</sup> Irell represented Broadcom in civil actions against it and CFO Ruehle arising out of alleged stock option backdating practices at Broadcom. At the same time, it was conducting an internal investigation into the same issues on behalf of Broadcom's management and Board.

As part of its internal investigation, the Irell lawyers interviewed Ruehle. Although the firm's lawyers claimed that they told Ruehle that they were doing the interview "on behalf of Broadcom," Ruehle later claimed that he was not specifically advised that the law firm could turn over his statements to the government in an effort to cooperate with the criminal investigation being conducted by the U.S. Attorney's Office. After Ruehle was indicted on charges including

conspiracy, securities fraud, and wire fraud, the government sought a hearing to resolve whether the statements made by Ruehle to the Irell lawyers were privileged communications.

Following a three-day evidentiary hearing, the district court sided with Ruehle and suppressed Ruehle's statements.<sup>5</sup> It scolded the law firm for failing to properly provide *Upjohn* warnings to Ruehle and for not putting in writing a warning that the firm represented Broadcom, not Ruehle, and that Broadcom could decide to cooperate and choose voluntarily to disclose Ruehle's statements to the government. The court held that the law firm had a clear conflict of interest by simultaneously representing parties with potentially conflicting interests and that it failed to obtain written consent from both parties as required by ethics rules.<sup>6</sup> Additionally, the court criticized the lawyers for not advising Ruehle that he should seek separate counsel. Most alarming, the district court held that "[b]ecause Irell's ethical misconduct has compromised the rights of Mr. Ruehle, the integrity of the legal profession, and the fair administration of justice, the Court must refer Irell to the State Bar for discipline. Mr. Ruehle, the government, and the public deserve nothing less."<sup>7</sup>

On appeal, the Ninth Circuit reversed the suppression order but began its opinion by stating that the facts required it to "explore the treacherous path which corporate counsel must tread under the attorney-client privilege when conducting an internal investigation to advise a publicly traded company on its financial disclosure obligations."<sup>8</sup> It then detailed how Ruehle knew that some of his statements would not remain confidential because, as he knew, they were going to be shared with auditors involved in an ongoing "Equity Review" of the company. The Ninth Circuit noted that during the evidentiary hearing in district court, Ruehle "frankly admitted that he understood the fruits of Irell's searching inquiries would be disclosed to Ernst & Young in order to convince the independent auditors of the integrity of Broadcom's financial statements to the public, or to take appropriate accounting measures to rectify any misleading reports."<sup>9</sup>

Moreover, Ruehle was “no ordinary Broadcom employee,” but rather the CFO of a sophisticated, multi-billion dollar corporate enterprise, whose duties included strict compliance with the reporting and record keeping requirements of Sarbanes-Oxley, the federal securities laws, and a host of other federal and state rules and regulations.<sup>10</sup> As such, he could not “credibly claim ignorance of the general disclosure requirements imposed on a publicly traded company with respect to its outside auditors or the need to truthfully report corporate information to the SEC.”<sup>11</sup> Because Ruehle knew that his statements would be used by third parties, and the government did nothing to encourage an ethical breach by his lawyers, the appellate court refused to uphold the trial court’s order excluding Ruehle’s statements.

While allowing the government to use Ruehle’s statements against him, the Ninth Circuit can hardly be said to have exonerated Irell. Instead, it simply held that “Irell’s allegedly unprofessional conduct in counseling Broadcom to disclose, without obtaining written consent from Ruehle, while troubling, provides no independent basis for suppression of statements he made in June 2006.”<sup>12</sup>

What, precisely, were the missteps by the lawyers in the Broadcom case, and what can we learn from them? First, it is crucial that *Upjohn* warnings and any surrounding colloquy be memorialized. It is crucial that counsel have a clear record of what warnings were provided to the employee and the timing of those warnings. A lawyer should avoid the uncomfortable scenario of becoming a witness when a client claims that counsel never appropriately advised him that his statements might not remain confidential and that the lawyer’s primary duty of loyalty is to the corporate entity. Second, *Upjohn* warnings must be complete and straightforward. They should begin with the key point of the *Upjohn* decision itself – counsel represents the company, not the individual. In that regard, it is valuable to advise the witness that he has the right to seek advice from his own lawyer. Counsel must further advise the attorney that the information will

be covered by the attorney-client privilege, but that the corporation can choose to waive that privilege and the information may be shared with third parties if the corporation feels it is in its own best interest. Finally, the witness should be instructed to keep his or her statements confidential. Employees need to understand that if they disclose their information to others, those conversations may not be privileged and the employee will be risking greater disclosure of confidential information.

Most important, when a potential conflict ripens, the lawyers will find themselves in the crosshairs. Sometimes, in an effort to gain the trust of a corporate client, counsel will seek to be as non-confrontational as possible and avoid unpleasant subjects, such as how the employee's own conduct might have put the company at risk. Yet, establishing too close of a relationship with the top officers of a corporation may have exactly the effect that *Upjohn* sought to avoid – conflating the interests of the company with the interests of the individuals who make up that company. Lawyers undoubtedly find it easier to relate to flesh-and-blood clients than to an abstract legal fiction. But the ethical rules demand that the internal investigation lawyers serve the company's interests and that the employees be so advised. Keeping this basic principle in mind will lead to more direct, certain and documented *Upjohn* warnings during internal investigations.

More than any other, one fact stands out in the Broadcom case. There were pending civil suits against the company and various individuals, including Ruehle, concerning the backdating. At the evidentiary hearing, Ruehle testified to his understanding that Irell was representing him individually in those matters, and indeed the record shows that they did undertake to represent him. This dual representation by the Irell lawyers should have been a clear red flag to them that they were on dangerous ground. The lack of precision in how they addressed *Upjohn* suggests that it was not.

#### **D. Pendergest-Holt v. Sjoblom** <sup>13</sup>

Lawyers who do not properly administer *Upjohn* warnings and secure written conflict waivers from clients also risk more than a court scolding or even professional discipline. As the recent case of Laura Pendergest-Holt against former Proskauer Rose lawyer Thomas Sjoblom indicates, counsel also risk a major malpractice suit.

Sjoblom and his firm once represented Stanford Financial, a multi-billion dollar company. Laura Pendergest-Holt was Stanford's chief investment officer. The company was being investigated by the Securities and Exchange Commission for an alleged \$8 billion fraud. During the investigation, Sjoblom accompanied Pendergest-Holt to an SEC deposition. According to Pendergest-Holt's complaint, during the deposition the SEC lawyer asked Sjoblom to confirm that he was not representing Pendergest-Holt personally. Sjoblom's lawyerly answer was far from clear. He reportedly stated, "I represent her insofar as she is an officer or director of one of the Stanford affiliated companies." Undoubtedly this statement meant different things to different people: To Sjoblom, it meant "I only represent you in your official capacity and not as an individual." To Pendergest-Holt, it meant "I represent her." Of course, when people get indicted and go to jail, the difference between their corporate capacity and individual capacity becomes fairly meaningless. They are, after all, in jail.

Pendergest-Holt sued Sjoblom after he made a noisy withdrawal from the Stanford case. Sjoblom effectively turned in his former client for lying, advising the SEC: "I disaffirm all prior oral and written representations made by me and my associates to the SEC staff regarding Stanford Financial Group and its affiliates."<sup>14</sup> After she was subsequently charged in a criminal complaint for obstructing a proceeding by failing to testify truthfully to the SEC, Pendergest-Holt

sued the lawyer for failing to disclose to her that his true allegiance was to Stanford and for failing to advise her that she should have had her own counsel. She also claimed that counsel did not advise her there was no attorney-client privilege for her communications and that he was putting the interests of other principals in the Stanford group ahead of hers.

Although she subsequently moved to dismiss the malpractice claim without prejudice,<sup>15</sup> the case further underscores the importance of clarifying at the outset who counsel represents and the dangers of trying to represent both the company and individual employees. The case also highlights the prejudice that a client can claim if *Upjohn* warnings are not clear. First, like Pendergest-Holt, the witness may claim that the lawyer deliberately failed to protect the witness's Fifth Amendment rights during the investigation because doing so would be counter to the company's interests. Second, the witness is bound to claim that he or she was offered as a sacrificial lamb for the misdeeds of others in the company. Finally, the witness will claim that the lawyer avoided advising the witness to seek separate counsel because the lawyer's investigative duties would be simplified by lulling the company employee into providing a statement.

Ethical rules and SEC regulations make it difficult enough for a lawyer to represent corporate entities. While a lawyer has a duty of confidentiality to a client, a lawyer also may not further a fraud and must take steps to rectify any fraud it has unwittingly committed on the court or an agency. For example, ABA Model Rule 3.3(a) provides: "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Sarbanes-Oxley further allows lawyers to make disclosures in order to prevent further fraud on investors or to help rectify frauds that have been committed.<sup>16</sup> Thus, even when the client's identity is clearly established, a lawyer's duty of confidentiality to the client is not absolute.

It is even more difficult to keep the peace with employees whose statements can harm or help the company, and who fear cooperating because they do not know who, if anyone, will represent their interests. Yet, that is exactly what counsel are expected to do. *Upjohn* warnings are one way of ensuring that the employee realizes that, for the lawyer, the company will come first. Lawyers who want to avoid Mr. Sjoblom's experience of being sued for malpractice should use *Upjohn* warnings and the ensuing discussion with the employee-interviewee to make clear early that the attorney represents the entity and, to the extent that the company and the individual have a conflict, the attorney will zealously represent the company. These warnings must be carefully memorialized so that there is no dispute that the employee was properly advised of the attorney's role. While practitioners can debate whether a signed acknowledgement should be obtained from interviewees, the utility of such a statement in defending a malpractice claim is indisputable.

#### **E. Guidance from the ABA**

Responding to the rising tide of confusion, on July 17, 2009, a working group of the ABA White Collar Crime Committee issued a report on *Upjohn* Warnings.<sup>17</sup> The report provides an extensive analysis of the issues raised for corporate counsel when interacting with corporate employees. It also recommends some best practices when outside or inside corporate counsel are put in this role. First, it provides a model *Upjohn* warning:

I am a lawyer for or from Corporation A. I represent only Corporation A,  
and I do not represent you personally.

I am conducting this interview to gather facts in order to provide legal advice

for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.

Your communications with me are protected by the attorney-client privilege. But the attorney–client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss *this* discussion.

Do you have any questions?

Are you willing to proceed?<sup>18</sup>

While the working group’s recommendation only requires that the warnings be explicit and not necessarily in writing, several state ethical rules do require conflict waivers to be in writing.<sup>19</sup> In those jurisdictions, where the lawyers actually represent both the individual and the company (as in Broadcom), counsel should obtain the employee’s written acknowledgment of counsel’s role and the company’s right to waive the privilege. However, where a written waiver

is not required, counsel may worry about the chilling effect a request for a written waiver may have on the employee's willingness to share information. At a minimum, counsel should use standardized warnings and go to all necessary lengths to ensure that the employee understands how the corporate privilege operates and that there is a solid record that the *Upjohn* warnings were provided. Just as suspects in criminal cases readily speak after being provided their *Miranda* warnings, it is still likely that most employees will continue to cooperate even after being told of counsel's role and the limited nature of the privilege.

The working paper also seeks to provide answers to questions that frequently arise when employees are interviewed, such as:

1. *"Do I need a lawyer?"*

The answer is that corporate counsel cannot answer that question, because doing so could be construed as providing legal advice. The employee is entitled to separate counsel, but corporate counsel should not opine on whether separate counsel is necessary. Counsel must keep in mind applicable state ethical rules. Often, they require that a lawyer avoid giving legal advice to a non-client, other than to secure counsel.<sup>20</sup> While there is a temptation for corporate counsel to analyze the investigation and to tell the employee that it does not appear that there is a conflict at the time of the interview, the lawyer must also recognize the possibility that at some point the employee's interests may conflict with that of the corporation.

2. *"What is my status? Is there a conflict of interest?"*

The working paper advises that counsel should explain any conflict to the employee. However, another alternative would be to return to the suggestion that the employee seek

independent counsel even on this issue. It can be hazardous for counsel just beginning an employee interview to hazard a guess as to whether there is an actual conflict of counsel.

3. “*What if I refuse to cooperate in this investigation?*”

An employee should be told directly about the company’s pertinent policies on cooperating in internal investigations. Typically, an employee who refuses to cooperate in an internal investigation will be subject to discipline, including termination. However, counsel should be sensitive to later claims of undue coercion. Again, if the employee is concerned, the employee should be told that she is entitled to separate counsel to advise her.

Many local and national bar organizations are beginning to focus on the problems that arise in corporate internal investigations. It is imperative that counsel stay apprised of the work in this area so as to avoid the mistakes of the past. Moreover, in this era of global entities and international investigations, practitioners must consider how the privilege operates in multiple jurisdictions and whether the procedures around *Upjohn* warnings need to be modified to account for varying rules governing the privilege.

**F. Learning from the Past and Moving Forward**

In the last few years, there have been several cases that have highlighted how important it is for counsel to properly advise employees of the *Upjohn* warnings. For example, in *United States v. Stein*,<sup>21</sup> a partner at KPMG was questioned by counsel hired by the accounting firm during an IRS investigation, but the partner claimed not to have received *Upjohn* warnings. Although the court found on other grounds that there was no attorney-client relationship between

the partner and corporate counsel, the court emphasized that the issue could have been avoided if proper advisements had been provided.

Similarly, in *United States v. Int'l Bd. Of Teamsters*,<sup>22</sup> the Second Circuit criticized outside counsel for failing to clarify that in its investigation of the organization's fundraising activities, counsel represented the organization, not the employee. As the court stated, "attorneys in all cases are required to clarify exactly whom they represent, and to highlight potential conflicts of interest to all concerned as early as possible."<sup>23</sup>

More recently, the Fourth Circuit in *In re Grand Jury Subpoena*,<sup>24</sup> the court frowned at the watered down nature of the *Upjohn* warnings provided during an internal investigation of America Online ("AOL"), though it still found that the employees did not reasonably believe they had an attorney-client relationship with the investigating attorney. In that case, AOL outside counsel said that "counsel could" represent the employee as well as the company "as long as no conflict appeared." This statement could have been very misleading, but for the fact that the employees were told that the corporation had the sole discretion to disclose information they provided.

Perhaps as a result of increased attention to these issues and greater scrutiny by the courts, the trend appears to be toward more consistent and uniform use of *Upjohn* warnings. People, especially when they are in trouble, hear what they want to hear. They want to hear that a lawyer (especially a free lawyer) will represent them and their company and save both from trouble. Yet, that is not what the lawyer's role is. Whether in writing or orally, the essential job of a lawyer providing *Upjohn* warnings is to accurately portray the role of the lawyer. The role of the lawyer is to protect the company even though, at times, doing so means disclosing to the

authorities – to the detriment of the individual employees – confidential statements made by those employees whose actions have placed the company at risk.

It remains to be seen whether the formalizing of *Upjohn* warnings will chill employee cooperation and lead to stalemates in internal investigations. As of yet, there is no empirical evidence that it is doing so. What is clear is that counsel who fail to give the warnings or to appreciate the risks of potential conflict expose themselves to criticism by the courts, professional discipline, and even civil liability. Given these realities, it is imperative that all counsel – internal and external – scrupulously inform employees at all levels of the organization of the potential conflicts of interest and do so in a way where the warnings cannot be contested. Warnings are a time for plain language. As recent cases have shown, there is too much at stake for the company, corporate counsel and even the government to not handle these warnings correctly.

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<sup>1</sup> ABA Model Rules of Professional Conduct, Rule 1.13(a) & (b).

<sup>2</sup> 449 U.S. 383 (1981).

<sup>3</sup> Many lawyers also refer to these warnings as the “corporate Miranda warnings,” although they are not administered by law enforcement officials, but by lawyers who are seeking to avoid conflicts of interests during internal investigations of corporate clients. *See, e.g.*, Lee G. Dunst & Daniel J. Chirlin, *A Renewed Emphasis on Upjohn Warnings*, 23 White-Collar Crime: Andrews Litigation Reporter (West Sept. 2009); Stephen Taub, *Walking a Tightrope With Upjohn Warnings*, Compliance Week, <http://www.complianceweek.com/article/4381/walking-a-tightrope-witness> (Aug. 5, 2008); Paul B. Murphy & Lucien E. Dervan, *Attorney-Client Privilege & Employee Interviews in Internal Investigations*, Contemporary Legal Notes (Washington Legal Foundation Mar. 2006).

<sup>4</sup> For more details regarding the case and the judge’s order, *see* Amanda Bronstad, *Circuit Urged to Sustain Judge’s Slap at Irell*, N.L.J. 12 (July 27, 2009). *See also* Shari A. Brandt & John Q. Walker, *Can an Upjohn Warning Avoid Representation Ambiguity?*, 27 NYSBA Inside 1 (Spring/Summer 2009).

<sup>5</sup> *See United States v. Nicholas*, 606 F.Supp. 2d 1109 (C.D. Cal. 2009).

<sup>6</sup> Cal. Rules of Prof’l. Conduct 3-310(A)(2).

<sup>7</sup> *Nicholas*, 606 F. Supp. 2d at 1121.

<sup>8</sup> *United States v. Ruehle*, 583 F.3d 600, 2009 U.S. App. LEXIS 21450 (9<sup>th</sup> Cir. 2009).

<sup>9</sup> 583 F.3d at 609.

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<sup>10</sup> *Id.* at 610.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 613.

<sup>13</sup> *Pendergest-Holt v. Sjoblom*, No. 3:09-cv-00578-G, complaint filed (N.D. Tex. Mar. 27, 2009).

<sup>14</sup> *Sizing up Thomas Sjoblom's "Noisy Withdrawal,"* WSJ.com (Feb. 19, 2009).

<sup>15</sup> *Pendergest-Holt v. Sjoblom*, No. 3:09-cv-00578-G, Notice of Dismissal Without Prejudice filed (N.D. Tex. Apr. 9, 2009).

<sup>16</sup> Sarbanes-Oxley Act of 2002, Section 307, Pub. L. No. 107-204, 116 Stat. 745 (2002); 17 C.F.R. Part 205 (2006).

<sup>17</sup> Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees, available at [http://www.fr.com/news/2009/July/ABA\\_Upjohn\\_Task\\_Force.pdf](http://www.fr.com/news/2009/July/ABA_Upjohn_Task_Force.pdf).

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *See, e.g.*, Cal. Rules of Prof'l Conduct 3-310(C).

<sup>20</sup> *See, e.g.*, N.Y. Rules of Professional Conduct, Rule 4.3

<sup>21</sup> 463 F.Supp. 2d 459 (S.D.N.Y. 2006).

<sup>22</sup> *United States v. Int'l. Bd. of Teamsters*, 119 F.3d 210, 217 (2d Cir. 1997).

<sup>23</sup> *Id.* at 217.

<sup>24</sup> 415 F.3d 333 (4th Cir. 2005).