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Expert Analysis

A Renewed Emphasis on *Upjohn* Warnings

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As white-collar government investigations and enforcement actions increase in the wake of the recent financial crisis, so too do the challenges for attorneys engaged in corporate internal investigations. Specifically, lawyers face potential conflict-of-interest issues in connection with these investigations and may run afoul of ethics rules and risk penalties by failing to take adequate steps to protect themselves.

For example, several recent cases have involved allegations of attorneys' failure to appropriately handle and disclose conflicts of interest when representing company employees in connection with internal investigations or inquiries from government regulators. As a result, there has been an increased focus on so-called *Upjohn* warnings (otherwise known as the "corporate *Miranda*") that company counsel provides to company employees in connection with these investigations. While these recent cases have more to say about traditional conflict-of-interest concerns than *Upjohn* warnings, it is important for practitioners to be mindful of the potential ethical pitfalls surrounding each.

The Upjohn *Warning*

The so-called *Upjohn* warning takes its name from the seminal Supreme Court case *Upjohn Co. v. United States*,[1] in which the court held that communications between company counsel and employees of the company are privileged, but the privilege is owned by the company and not the individual employee. Thus, in an internal investigation, the company is the client and therefore controls privilege. The purpose of the warning is to remove any doubt that the lawyer speaking to the employee represents the company, and not the employee.

A typical *Upjohn* warning consists of an explanation that the lawyer represents the company, not the individual. Therefore, anything revealed during the course of the interview is only privileged as between the lawyer and the company. The employee has no control over whether the company decides to waive the privilege, which often may be done sometime in the future in the hope of obtaining cooperation credit from the government.[2]

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Clearly then, this presents a potentially difficult situation for a practitioner. It is in the best interest of the company and outside counsel to encourage employees to be candid and forthcoming during the course of an investigation. However, at the same time, a proper *Upjohn* warning makes it clear that employees' statements are not within their own control, as the company has the right to waive the privilege and disclose these statements to the government, and thus could make employees less likely to reveal potentially incriminating facts.

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Also, this creates the possibility that practitioners might give an unclear or incomplete *Upjohn* warning. Even experienced businesspeople may not appreciate the nuances of privilege, and the risk looms far greater with less sophisticated employees who are given an unclear *Upjohn* warning.

Two highly publicized cases from earlier this year highlight the issues facing attorneys conducting internal investigations, including the ethical challenges arising from interviews of company employees.

Broadcom: A Study in Potential Conflict Of Interest

In connection with the pending criminal case against senior management of Broadcom Corp., a law firm in Los Angeles suffered the ire of U.S. District Judge Cormac J. Carney for "breach[ing] its duty of loyalty" to its client, former Broadcom CFO William Reuhle.[3] In April Judge Carney issued a scathing opinion on the ethics of multiple representations, finding that the law firm's actions created a conflict of interest that no *Upjohn* warning could salvage. As a result, Judge Carney suppressed Reuhle's statements and even went so far as to refer the law firm to the California State Bar for discipline.

Broadcom retained the firm in 2006, when the government began investigating the company in connection with its stock option practices. As a result, the law firm began conducting an internal investigation into alleged stock option backdating at Broadcom. At the same time, Broadcom was sued in two separate civil actions related to the same issues, and Reuhle was individually named in both actions, where the same law firm represented him for the first several months of the proceedings.

Simultaneously, as part of the internal investigation, the law firm interviewed Reuhle. At the beginning of the interview, Reuhle supposedly was told only that the investigation was being done "on behalf of Broadcom." Subsequently, and apparently without Reuhle's consent, Broadcom agreed to turn over his interview statements to the U.S. attorney, and Reuhle later was indicted on a variety of criminal charges in June 2008. Reuhle then filed a motion to suppress his statements made to company counsel, arguing that his rights under *Upjohn* had been violated.

In his April 1 decision Judge Carney lambasted the law firm for failing to provide a proper *Upjohn* warning to Reuhle, rejecting the suggestion that a statement that the interview was done "on behalf of Broadcom" was sufficient. The judge criticized the attorneys' failure to explain that they were representing Broadcom's interest in the interview, rather than Reuhle's, and that any information disclosed could be used by Broadcom or disclosed to the government.

Indeed, Judge Carney found that Reuhle had a very legitimate reason to believe that the law firm represented his personal interests, as the firm had been representing him in civil litigation related to the identical subject matter as the internal investigation. According to Judge Carney, California disciplinary rules mandate that any simultaneous representation presenting conflicting interests requires written consent by both parties — something the law firm apparently never obtained.[4]

The judge found that the law firm violated its duty of loyalty to Reuhle because:

- It questioned him for the benefit of a separate client, Broadcom; and
- It did not consult Reuhle before disclosing his statements to third parties, particularly the government.

According to Judge Carney, the firm should have informed Reuhle that it might be in his best interest to pursue separate counsel.

This recent decision presents the practitioner with several instructive lessons. First, it is essential that very early in any internal investigation, the attorney assesses where potential conflicts of interest might arise. This is particularly true when separate civil suits implicate company executives who may also be witnesses in connection with the internal investigation.

Second, if an attorney does decide to represent both the company and an individual employee, she should obtain a written conflict waiver. Notably, however, even a conflict waiver may not prevent a circumstance where the attorney is forced to resign from both representations, if the conflicts become irreconcilable.

Third, an *Upjohn* warning is not necessarily a replacement for a conflict waiver, even where the *Upjohn* warning is full and sufficient.

Finally, when interviewing a company employee, an attorney should always administer a full *Upjohn* warning and note the fact in writing contemporaneously or memorialize it soon thereafter. A watered-down *Upjohn* warning may not be sufficient, as demonstrated in the Broadcom case, as well another case from earlier this year.

Stanford Financial Group: Another Study In Potential Conflict of Interest

On the heels of the Bernard Madoff scandal, another alleged Ponzi scheme drama exploded in early 2009 in connection with Stanford Financial Group. According to public reports, the criminal and regulatory investigation into Stanford broke open several days after a New York lawyer made a "noisy withdrawal" from his representation of Stanford before the Securities and Exchange Commission. Specifically, the attorney withdrew his representation from the company and disaffirmed all his prior statements made to the SEC.

Lessons From the Broadcom And Stanford Cases

- Very early in any internal investigation, assess where potential conflicts of interest might arise.
- If you decide to represent both the company and an individual employee, obtain a written conflict waiver.
- When interviewing a company employee, always administer a full Upjohn warning.

Shortly thereafter, Laura Pendergest-Holt, Stanford's former chief investment officer, sued the lawyer and his firm for malpractice involving an alleged breach of the fiduciary duty of loyalty.[5] Although Pendergest-Holt later moved to dismiss the action without prejudice, the facts surrounding her malpractice claim again demonstrate the pitfalls for an attorney or law firm that simultaneously represents both a company and its executives.

The pendulum may be swinging toward heightened scrutiny of conflicts of interest; the days of the "watered-down" Upjohn warnings could be numbered.

According to the civil complaint, the lawyer accompanied Pendergest-Holt to her deposition at the SEC Feb. 10. Pendergest-Holt said she believed that the lawyer was her attorney and represented her in an individual capacity. The complaint recounts an alleged conversation at the deposition where the attorney told the SEC staff, "I represent her insofar as she is an officer or director of one of the Stanford affiliated companies." Receiving no further clarification, Pendergest-Holt claims to have believed that this attorney would represent her interests.

However, Pendergest-Holt alleges in her complaint that the attorney failed to serve her interests in several material respects:

- He did not inform her of her Fifth Amendment right not to testify and instead allowed her to make statements to the SEC that subsequently led to her indictment on obstruction charges;
- He failed to tell her that her conversations with him were not privileged, insofar as the company controlled the privilege;
- He did not explain that conflicts of interest existed between Pendergest-Holt and Stanford that would not allow the attorney to simultaneously represent both parties; and

- He never advised her that she should seek separate counsel.

If these allegations seem to echo the facts in the Broadcom case, it is because these problems may be far from unusual. If these two recent, highly publicized incidents are any indication, the pendulum may be swinging toward heightened scrutiny of conflicts of interest. As such, the days of the "watered-down" *Upjohn* warnings could be numbered.

The Days Ahead: Considerations For Practitioners

The possibility of future complications and consequences arising from incomplete or unclear *Upjohn* warnings prompts a number of practical lessons that can be drawn from these two recent cases. First, it is important to assess, very early on in any investigation, which parties will require separate counsel. That counsel should be provided to the company employee promptly, ideally before any substantive information is learned from the witness. Any confidences shared by a witness-client or prospective witness-client may present future conflict issues that could force an attorney to resign from representing both the witness and the company.[6] Moreover, if during an interview with an unrepresented witness, a lawyer discovers that the witness has interests that conflict with the interests of the company, the ethics rules require the attorney to advise the witness to secure counsel.[7]

An Upjohn *warning is not necessarily a replacement for a conflict waiver, even where the warning is full and sufficient.*

Second, if an attorney does decide to represent both an individual and the company, she would be prudent to obtain an informed written conflict waiver from each party.[8] Even then, the lawyer must reasonably believe she can represent both parties' interests adequately. With that in mind, it is generally good practice to include in any conflict waiver (or retainer agreement), a provision that, in the face of a conflict, allows the attorney to resign from one representation in favor of the other.

Third, when conducting an interview with a company employee, company counsel should administer a complete *Upjohn* warning. Ideally, the interview preparation materials or some form of written protocol should outline the substance of the warning. Additionally, the administration of the warning should be documented contemporaneously in the interview notes, and it also should be noted that the witness acknowledged that he understood the warning. A properly administered (and memorialized) warning can save an attorney plenty of headaches down the road.

By example, a comprehensive *Upjohn* warning should include the following statements and explanations, in some form or another:

- We represent the company, not you.
- As part of our investigation, we need to gather information. We do so by speaking with employees. We gather this information for the purpose of providing legal advice to our client, the company. As such, this means that our conversation with you is protected by the attorney-client privilege.
- However, the privilege is between the lawyers and the company, not you. The privilege is controlled by the company, and the company may decide to share any information it learns through this interview with third parties, including the government, without your permission or notice.
- Finally, as an employee, we ask that you keep everything discussed here confidential. Please do not share this conversation with anyone, including other employees. This is what keeps the conversation privileged.

An interesting issue arises in the context of in-house representation. In-house counsel represents the company, as opposed to individual employees. The question is when do in-house attorneys need to provide an *Upjohn* warning to employees. Ultimately, the calculus is very similar to interviews conducted by outside counsel. Generally, the more substantive the interview, the more senior the witness or the more involvement of the employee in question, the greater likelihood that an *Upjohn* warning is necessary and prudent.

Finally, it is worth noting that while the recent Broadcom and Stanford cases may at first appear to be outliers, the problems they present are common and likely to face any practitioner who engages in an

internal investigation and must provide *Upjohn* warnings when interviewing company employees. Moreover, as the current administration in Washington continues to turn up the heat on enforcement efforts, it is reasonable to expect that internal investigations will become more frequent and these issues surrounding potential conflicts of interest concerning company employees may become more prevalent. As such, it is incumbent upon attorneys to keep in mind the rules of the road concerning *Upjohn* warnings in order to avoid the ignominy of facing an ethics review board and to help prevent a company employee from unwittingly forfeiting his Fifth Amendment rights.

Notes

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

2 On Aug. 28, 2008, the Department of Justice released the "Principles of Federal Prosecution of Business Organizations," Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys. The Filip Memorandum reversed department policy on cooperation credit, prohibiting the government from considering privilege waiver in its determination of whether a company should receive credit for cooperating. The SEC released a similar update to its enforcement manual Oct. 6, 2008, that instructed the staff not to request privilege waivers. It remains to be seen whether this will lead to substantially fewer instances of company privilege waiver.

3 *United States v. Nicholas,* No. SACR 08-00139, 2009 WL 890633, at *1 (C.D. Cal. Apr. 1, 2009).

4 *Id.* at *6; Cal. Rules of Prof'l Conduct 3-310(A)(2).

5 *Pendergest-Holt v. Sjoblom,* No. 3:09-cv-00578-G, *complaint filed* (N.D. Tex. Mar. 27, 2009), at ¶¶19-22.

6 *See, e.g.,* N.Y. Rules of Prof'l Conduct § 1.18.

7 *See, e.g.,* N.Y. Rules of Prof'l Conduct § 4.3.

8 *See, e.g.,* N.Y. Rules of Prof'l Conduct § 1.7(b)(4).

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