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PRACTICE TIPS

The Importance of Robust *Upjohn* Warnings after Ruehle

By Lee Stein and Elizabeth Kruschek

When a corporation finds itself needing to conduct an internal investigation, it knows that, at some point, it may want to disclose information obtained during the investigation to the government. Such internal investigations—typically conducted by outside counsel retained expressly for the purpose of conducting an investigation that ultimately may be disclosed—invariably involve interviews of employees of the corporation who may have knowledge of the supposed wrongdoing. As practitioners are well aware, these interviews can be subject to a claim of attorney-client privilege on behalf of the employees who are interviewed if appropriate warnings disclaiming an attorney-client relationship—so-called *Upjohn*[1] warnings—are not provided to the interviewed employees.

Any claim of privilege on the part of an employee seriously compromises a corporation's ability to waive the privilege in a subsequent government investigation and to disclose information obtained during the course of the internal investigation. Thus, *Upjohn* warnings—which make clear that the corporation, and only the corporation, holds and can waive the privilege—are critical components of any internal investigation because they ensure that a corporation is in the best position to fully use all information from an internal investigation in any subsequent interactions with government investigators.

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A recent Ninth Circuit case, *United States v. Ruehle*,[2] illustrates the importance of giving robust *Upjohn* warnings during internal investigations. In that case, Broadcom retained a law firm to investigate its current and past stock option granting practices in anticipation of an SEC inquiry.[3] William Ruehle, Broadcom's CFO, was heavily involved in the decision to retain the law firm for the investigation and in the investigation itself; he had substantial knowledge of the underlying facts.[4] Ruehle was also well aware that the intent of the investigation was to collect information that would be turned over to Broadcom's external auditors, as well as to governmental investigators, if necessary.[5]

Two civil lawsuits against Broadcom and Ruehle personally, among others, which concerned the same subject matter as the internal investigation, followed soon after the firm was retained to conduct the investigation. The firm was already the counsel of record for Broadcom and individual management defendants in one of those suits, which was an existing class action that was amended to include the additional allegations of wrongdoing.[6] After those suits were filed, Ruehle was interviewed by outside counsel as part of the internal investigation.[7] Although the lawyers involved claimed that Ruehle was given an *Upjohn* warning, both the district court and the Ninth Circuit assumed that no such warning was given because Ruehle had no memory of receiving a warning and the attorneys were unable to provide any documentation to the contrary.[8] During the interview, there was no mention of the civil lawsuits or Ruehle's personal liability, nor did Ruehle seek legal advice about his personal liability.[9] The law firm did, however, briefly represent Ruehle individually in the civil suits,

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although the exact date on which the representation began was disputed.[10]

When Broadcom's attorneys disclosed Ruehle's statements in the course of a subsequent government investigation, Ruehle sought to suppress those statements on the grounds of attorney-client privilege.[11] The district court agreed with Ruehle and, in so doing, strongly condemned the law firm's conduct of the internal investigation and went so far as to refer the firm to the State Bar of California for possible disciplinary actions.[12]

The Ninth Circuit, however, reversed.[13] While the Court accepted the district court's finding that an attorney-client relationship existed between Ruehle and the firm hired to conduct the investigation, it held that Ruehle's statements were not privileged because they were not made with the expectation of confidentiality.[14] The Court noted that Ruehle actively participated in the internal investigation and acknowledged repeatedly that the results of the investigation were expected to be disclosed to third parties. Therefore, he could not claim that he reasonably believed any statements made during his interview were confidential.[15] Although this particular case contained unique complicating facts, it illustrates the importance of ensuring that a corporation take every possible step to ensure that it can use or disclose information gained from employees during an internal investigation.

The Fourth Circuit's decision in *In re Grand Jury Subpoena: Under Seal*[16] is just one additional example of the importance of robust *Upjohn* warnings. There, outside counsel was retained by AOL to conduct an internal investigation.[17] Counsel indisputably provided *Upjohn* warnings, but included in those warnings a statement that they "could" represent the employees in addition to the corporation "as long as no conflict appear[ed]."[18] Three former employees subsequently moved to quash grand jury subpoenas for documents related to the investigation on the grounds that an attorney-client relationship was formed based on counsel's statements that they "could" represent the employees.[19] Although the Fourth Circuit affirmed the district court's denial of the motions to quash, it warned that its "opinion should not be read as an implicit acceptance of the watered-down '*Upjohn* warnings' the investigating attorneys gave the appellants," noting that such warnings were "a potential legal and ethical mine field," given the risks inherent in establishing an attorney-client relationship with an employee of the corporation.[20]

Because of the risks involved in inadvertently establishing an attorney-client relationship with an employee of the corporation during an internal investigation, not to mention the risks inherent in joint representation of a corporation and one of its employees, it is critical that all parties involved in any internal investigation understand the ground rules surrounding the attorney-client privilege from the outset of the investigation.

Here are some tips:

1. Establish the rules at the beginning of the internal investigation. Outside counsel should set forth the expectations governing the internal investigation, including the nature of the attorney-client relationship, via letter to the client – the corporation – at the very beginning of the representation. This letter should explain that outside counsel will interview employees during the internal investigation, that all employees will be advised that counsel represents only the corporation and not the individual employees, and that employees will be advised of the legal implications of their communications with counsel.

2. Provide a robust and complete *Upjohn* warning. To fully protect the corporation's interests, counsel should avoid the kind of "watered down" *Upjohn* warnings disapproved of by the Fourth Circuit. Incomplete or inadequate warnings frequently result from counsel's concern that a robust warning will frighten employees and discourage candor during the interview. Practitioners should take heart, however, that most employees will cooperate with an investigation regardless of the warnings, and, in any event, it is paramount that counsel protect a corporation's ability to control the privilege. For an example of a thorough *Upjohn* warning, see *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* (July 17, 2009), published by the ABA WCCC Working Group.

3. Be consistent in administering *Upjohn* warnings. Administer the same *Upjohn* warning to each employee at the beginning of the interview. If the *Upjohn* warning is administered orally, have a printed version of the text of the warning with you at every interview so that you can ensure that every employee has received an identical warning. This will also help to avoid any disputes about the content or exact wording of the warning.

4. Give the interviewee an opportunity to ask questions about the warning. It will be easier to identify any misunderstandings or potential conflicts if an employee is given an opportunity to clarify any aspects of the warning.

5. Document all *Upjohn* warnings. While there is a difference of opinion regarding whether counsel should provide employees with formal written *Upjohn* warnings,

it is clear that counsel should, at a minimum, make some form of contemporaneous record that a warning has been provided. It is ideal if employees sign a document providing the text of the warning and indicating that the employee has read the warning, understands it and is willing to be interviewed. Without documentation, there is a risk of a court finding, as did the Court in *Ruehle*, that no *Upjohn* warning was given at all.

6. Be especially vigilant about the risks associated with joint representation. While joint representation of a corporation and one of its employees is possible if there are no conflicts of interest, be aware that joint representation creates additional risks, as should be clear from the *Ruehle* opinion. If it appears at all likely that a conflict of interest may arise, decline the joint representation. If such representation is undertaken, make sure to advise the employee (as well as the corporation) in writing of the terms of the joint representation and to include *Upjohn* warnings in that communication.

Endnotes

1. *Upjohn v. United States*, 449 U.S. 383 (1981).
2. 583 F.3d 600 (9th Cir. 2009).
3. *Id.* at 602-03.
4. *Id.* at 602-04, 609-11.
5. *Id.*
6. *Id.* at 603, n.2.
7. *Id.* at 604.
8. *Id.* at 604 n.3, 605.
9. *Id.* at 604.
10. *Id.* at 605-06, n.4.
11. *Id.* at 605.
12. *Id.* at 606.
13. *Id.* at 613-14.
14. *Id.* at 607, 609.
15. *Id.* at 609-12.
16. 415 F.3d 333 (4th Cir. 2005).
17. *Id.* at 335-36.
18. *Id.* at 336.
19. *Id.* at 337.
20. *Id.* at 339-40.

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- Establish walls within a firm to prevent the department engaging in credit derivative trading from learning material non-public information from the lending department.
- Appoint a compliance officer who understands the new regulatory landscape and its intersection with CDS.
- Monitor trading activities of employees and look for large spikes in the purchase of credit derivatives in the period before a big corporate announcement is made.
- Abstain from selective disclosures to analysts in financial firms trading in credit derivatives and ensure that every communication is a wide dissemination of information.
- Utilize restricted lists and watch lists for companies that are being insured by CDS.
- Adopt and enforce procedures designed to eliminate insider trading in CDS and programs designed to educate on the potential dangers of insider trading.
- Require officers, directors, and majority shareholders to disclose their holdings on certain events at certain intervals.
- Impose a blackout period where CDS trading is restricted within a certain period of time, such as before corporate announcements or buy backs are made.
- Convey significant insider activity and corporate disclosure in a uniform publicly-accessible means to the public and to the appropriate exchange.

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