

Can an Upjohn Warning Avoid Representational Ambiguity?¹

By Shari A. Brandt and James Q. Walker

The head trader of Hedgeco gets called into a meeting with an in-house attorney and Hedgeco's regular outside counsel. He occasionally plays golf with the in-house attorney, and also knows the outside lawyer, who represented him personally in SEC depositions two years ago in connection with an investigation involving Hedgeco's trading of certain swap positions. After sitting down and exchanging pleasantries, the outside counsel announces that for the purpose of this interview, he and the in-house attorney represent Hedgeco, and not him individually; that any privilege that applies to the discussion that takes place belongs to Hedgeco, and not to him; and that Hedgeco may, in its sole discretion, decide to share the information he provides with government officials in connection with pending civil or criminal investigations, or disclose any information he provides to the public. The head trader is suddenly very uncomfortable, and asks his former lawyer (outside counsel) and his golf buddy (in-house counsel) whether he needs his own lawyer, and is told only that they cannot advise him in this matter, other than to advise him that he is free to seek his own attorney in connection with this interview. The head trader then asks whether he has to answer their questions, and is told that he is free to refuse to answer their questions, but that they will need to advise Hedgeco that he refused to cooperate with the investigation, and this may affect his continued employment at the firm. The head trader then turns to the two lawyers and says, "But you represented me—you are my lawyers too, aren't you?"

I. Possible Limitations on the Protection Provided by Upjohn Warnings.

It is always awkward to start a meeting with an already nervous employee by chilling the atmosphere with a standard Upjohn warning—explaining that the lawyers in the room represent the company and not the individual employee, that the privilege covering the conversation belongs to the company, and that anything the employee says may be disclosed to an outside party at the company's discretion.² The employee may feel betrayed, believing that as an employee of the company, the company's lawyers also represent the employee. Indeed, the employee may assume that the only reason the company's lawyers are distancing themselves from him or her is because they assume the employee was involved in the misconduct under investigation. This is further exacerbated by the unwillingness of the company lawyers to advise the employee, instead suggesting that the employee may wish to secure his or her own attorney.

Ironically, a recent decision issued by the Central District of California calls into question whether the Upjohn warnings that the company's lawyers provide in meetings with employees specifically to preserve the company's privilege are sufficient to protect the privilege, especially if the lawyer at issue had a prior attorney-client relationship with the individual employee. On February 25, 2009, Judge Cormac J. Carney of the U.S. District Court for the Central District of California issued a bench decision following a three-day evidentiary hearing in *United States v. Nicholas*. The hearing examined whether Irell & Manella LLP was free to disclose to Broadcom's auditor and to the government statements made to Irell lawyers by Broadcom's chief financial officer, William Ruehle, during an internal investigation of stock options backdating after the lawyers warned Ruehle that they were interviewing

him on behalf of Broadcom. To complicate matters, Irell had jointly represented Broadcom and Ruehle in a prior unrelated civil matter, and represented Ruehle, other employees, and the company in two civil lawsuits involving allegations of stock options backdating at the time of the meeting in which Ruehle made the statements at issue. Ruehle argued that the statements he made to Irell were privileged, and therefore they could not be used as evidence against him.

Although the extent of any former or current attorney-client relationship between Irell and Ruehle when he was interviewed in the internal investigation is not entirely clear from the facts that have been reported, papers filed by Ruehle in connection with the evidentiary hearing state his position that he viewed himself as having a continuing attorney-client relationship with Irell.³ Based upon that view, Ruehle argued that Upjohn warnings, which he did not recall receiving, were insufficient to invalidate the attorney-client relationship.⁴

Although Judge Carney, as of press time, had not issued a written opinion, the judge's comments from the bench indicated his acceptance of Ruehle's arguments.⁵ Judge Carney criticized Irell for disclosing information it had learned from Ruehle to the company's outside auditors. Judge Carney then ruled that if Irell had intended to disclose information learned from Ruehle, the firm should have obtained informed written consent from Ruehle making it clear that it intended to represent multiple clients with adverse interests and to disclose privileged information.

This decision clearly puts into question whether traditional Upjohn warnings can be relied upon to protect the company's ownership of the privilege. The decision also suggests that both outside *and* in-house counsel need

to think carefully about whether simultaneous representation of a company employee may jeopardize the lawyers' ability to represent the corporate client in future matters. Although the extent of any former or current attorney-client relationship between Irell and Ruele at the time of the interview is not entirely clear from the facts that have been reported, it seems that when the firm interviewed Ruele, it was gathering facts on behalf of the company, and not representing Ruele. Judge Carney's decision substantially raises the bar on what is required of lawyers to communicate effectively that outside counsel represents the company and not the individual employee who is being interviewed—namely obtaining, at least under these facts, the employee's *written* acknowledgement that the lawyers effectively communicated an Upjohn warning prior to the interview.⁶

II. Steps Necessary to Protect the Company's Privilege When In-House or Outside Counsel Decide to Represent an Employee of the Company.

Although the *Nicholas* decision is troubling to in-house and outside company counsel, there are steps that can be taken by the lawyers who represent the company to minimize the risk of the harmful outcomes that can result from a challenge to the use and/or disclosure of information gained from interviews of employees—outcomes that include suppression of evidence, disqualification of counsel, and lawyer disciplinary action. For example, in any instance in which the lawyers decide that it serves the interests of the corporate client and the corporate employee to provide common representation in connection with a matter, the lawyer can seek an advance waiver of conflicts. Indeed, the New York City Bar Association has approved advance waivers of conflicts, provided that: (i) the law firm discloses the relevant implications, advantages and risks of the common representation so that the client can make an informed decision as to whether to consent (and the client is in a position to understand); and (ii) a disinterested lawyer would believe that the law firm can competently represent the interests of all affected clients.⁷ Similarly, courts have upheld advance waivers of conflicts where the client consented to the waiver after full and reasonable disclosure.⁸ In addition, lawyers may obtain a client's consent to the firm's continued representation of one of the clients should a conflict develop during the course of a concurrent representation such that it would be inappropriate to continue to represent the clients jointly.⁹ Finally, with respect to any meeting with a corporate employee, lawyers may remove any ambiguity as to whether they represent the employee as well as the individual by giving a proper Upjohn warning, and creating contemporaneous evidence that the warning was provided.

Accordingly, whenever outside or in-house attorneys who represent the corporation interview corporate employees in connection with the investigation of a potential, threatened, or pending civil litigation or investigation (including an internal, regulatory or criminal investigation), the lawyers should consider the following steps:

- Provide a complete Upjohn warning in which the employee is informed that the lawyers represent the corporation and not the individual employee; the interview is covered by the attorney-client privilege, which belongs to and is controlled by the company, not the individual employee; and only the company may decide whether to waive the privilege and disclose information from the interview to third parties, including the government.
- If the employee is not represented by independent counsel in the interview, comply with Rule 4.3 in New York's Rules of Professional Conduct (formerly DR 7-104(A)(2) in the Lawyer's Code of Professional Conduct) by avoiding giving legal advice to the employee, other than the advice to secure counsel where the lawyers believe that the interests of the employee are reasonably likely to conflict with the interests of the corporate client. The lawyers may indicate that they have not learned any facts which suggest that the interests of the employee and the employer are in conflict, if this is true.
- Obtain the employee's written acknowledgement that the Upjohn warning was provided at the outset of the meeting. One way of accomplishing this would be to bring a pre-printed sheet listing the warnings to any interview of a company employee, review the sheet with the employee, and then obtain a signature from the employee acknowledging that the warnings were read.

If either outside counsel or an in-house attorney determines that it serves the interests of the corporation and the corporate employee to represent them concurrently, the representation should be memorialized in an engagement letter (or in the case of the in-house lawyer, a memo to the employee), signed by the employee and the corporation,¹⁰ that:

- Defines the scope of the representation of the employee in the instant matter;
- Describes the lawyer's concurrent representation of the corporation (and possibly affiliates) on a wide range of matters;
- Describes the risks and advantages of the concurrent representation;
- States that the corporation will compensate the lawyer for the instant representation;

- States that the information that the lawyer learns from the corporate employee will not be kept confidential from the corporation;
- States that the corporation may, in its sole discretion, decide to share the information that the lawyer learns from the corporate employee with third parties, including the government;

“Following the Nicholas decision, whenever in-house and outside attorneys interview an employee in connection with an investigation, the attorneys should consider obtaining written confirmation that the employee was given, and understood, the Upjohn warning.”

- States that the interests of the corporation and the employee are aligned, but provides that if a conflict should arise, the employee acknowledges that the corporation has been a longstanding client, and the employee consents to the lawyer’s continued representation of the corporation; and
- Provides that the employee also waives any conflict that may arise in the future with respect to the lawyer’s representation of the corporation, including in matters in which the interests of the corporation are adverse to the interests of the individual employee, such that the employee agrees not to move to disqualify the lawyer from representing the corporation in such future matters.

In sum, in-house and outside counsel should proceed with care when interviewing company employees. Following the *Nicholas* decision, whenever in-house and outside attorneys interview an employee in connection with an investigation, the attorneys should consider obtaining written confirmation that the employee was given, and understood, the Upjohn warning. Additionally, before undertaking a dual representation of both the company and company employees, outside company counsel and in-house counsel should go forward with the dual representation only after carefully considering the potential impact of that simultaneous representation on the ability to protect the company’s privilege in future investigations and litigations, and then entering into the form of engagement letter outlined above.¹¹

Endnotes

1. This article may be considered attorney advertising under applicable state law, is provided for educational and information purposes only, and is not intended and should not be construed as legal advice.

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2. See *Upjohn v. United States*, 449 U.S. 383, 386-96 (1981) (holding that the attorney client privilege can be maintained between a company and its attorneys even though communications have occurred between counsel and third-party employees). The purpose of the warning is to remove any doubt that the lawyer or lawyers speaking to the employee represent the company, and not the employee, and that any privilege that may attach to the discussion that ensues is controlled by the company.
3. See Defendant William J. Ruehle’s Memorandum of Law Re: Attorney-Client Privilege and Feb. 23, 2009 Evidentiary Hearing at 5-6, *United States v. Nicholas*, No. SACR 08-139-CJC (C.D. Cal. Jan. 20, 2009).
4. *Id.* at 6; see also William J. Ruehle’s Notice of Motion and Motion to Strike the Government’s *Ex Parte* Application for Evidentiary Hearing Re: Attorney-Client Privilege; and Opposition to Government’s *Ex Parte* Application for Evidentiary Hearing Re: Attorney-Client Privilege, Exhibit 2 (Special Master Protective Order Requiring Destruction or Return of Documents and Limiting the Further Use or Disclosure of the Documents or Their Contents) at 3, No. SACR 08-139-CJC (C.D. Cal. Jan. 20, 2009).
5. See Gabe Friedman, *Judge Slams Irell Firm for Ethics Lapses*, Daily Journal Corporation, Feb. 26, 2009; see also Gabe Friedman, *U.S. Judge Has Harsh Take on Irell’s Role in Broadcom Case*, Daily Journal Corporation, Feb. 24, 2009.
6. What is unclear after Judge Carney’s decision is whether oral Upjohn warnings are sufficient where there has been no prior simultaneous representation of the employee and the company. The Upjohn Task Force established by the ABA White Collar Crime Committee is about to complete a report on recommendations for company counsel, and we will be interested to see if the Task Force addresses this issue.
7. N.Y. City Eth. Op. 2006-1 (2006).
8. *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003); but see *Celgene Corp. v. KV Pharm. Co.*, 2008 WL 2937415, at *5 (D.N.J. July 29, 2008) (court disqualified law firm from representing defendant in patent dispute notwithstanding advance waiver signed by plaintiff where the waiver language in the retention agreements did not adequately address the risks associated with a conflict between concurrent representations, and thus consent was not “truly informed”).
9. See N.Y. State Eth. Op. 823 (2008).
10. See Rules of Professional Conduct, Rule 1.7(b)(4).
11. Following press time, Judge Carney issued a strongly worded Order Suppressing Privileged Communications in *United States v. Nicholas*, which clarified certain facts. The Order states that Irell concurrently represented Ruehle and Broadcom in other actions when Irell interviewed Ruehle. (Slip Op. at 3-4; 12-13.) Judge Carney doubted that Irell gave any Upjohn warning to Ruehle because Ruehle did not recall any warning and no warning is referenced in the lawyers’ notes or any other written record, and any warning that may have been provided was “woefully inadequate” because the Irell lawyers never told Ruehle that Irell did not represent him. *Id.* at 11. In any event, Judge Carney determined that the concurrent representations necessitated a written waiver of the “clear conflict” to waive the privilege covering Ruehle’s statements. *Id.* at 12. Judge Carney concluded by suppressing Ruehle’s statements and referring Irell to the California State Bar for “appropriate discipline.” *Id.* at 19.

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