

Issuing a Proper Upjohn Warning Will Not Cure Multiple Representation Conflicts

By James Q. Walker and Shari A. Brandt

I. Possible Limitations on the Protection by an Upjohn Warning.¹

A recent decision calls into question whether an Upjohn warning given by a company's lawyer to a company employee during an internal investigation is sufficient to protect the company's privilege, particularly if the company's lawyer had a prior attorney-client relationship with the employee or represents the employee concurrently. In *United States v. Nicholas*, Judge Cormac J. Carney of the United States District Court for the Central District of California held a three day evidentiary hearing to determine whether Irell & Manella LLP acted inappropriately when it disclosed to Broadcom's auditor and to the government statements made to Irell lawyers by Broadcom's chief financial officer, William Ruehle.² Ruehle made the statements at issue during an internal investigation of stock options backdating after the Irell lawyers had 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, at the time of the internal investigation, was representing Ruehle and the company in two civil lawsuits involving allegations of stock options backdating.³ Ruehle claimed that he had a continuing attorney-client relationship with Irell, that the statements he made to

Irell were privileged and could not be used as evidence against him, and that an Upjohn warning (which he did not recall receiving) was insufficient to invalidate the attorney-client relationship and waive the privilege.⁴

Judge Carney criticized Irell for disclosing information it had learned from Ruehle to the company's outside auditors. He noted that Ruehle did not recall receiving an Upjohn warning, that a warning was not reflected in any lawyer's notes, and that any purported warning was "woefully inadequate" because the Irell lawyers failed to inform Ruehle that Irell did not represent him.⁵ Judge Carney concluded that Irell would have needed to obtain a written waiver of the "clear conflict" presented by its concurrent representations before it would have been permitted to disclose Ruehle's statements.⁶ Accordingly, he suppressed Ruehle's statements and referred Irell to the California State Bar for "appropriate discipline."⁷

The *Nicholas* decision is not the first to cast doubt on whether a traditional Upjohn warning can be relied upon to protect the company's ownership of the privilege. For example, in an earlier case, in which a company's employees were interviewed by in-house and outside counsel pursuant to an Upjohn warning and the additional statement to the employees that "we can represent you as long as no conflict appears," the Fourth

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"[C]ounsel need to think carefully about whether simultaneous representation of a company and one of its employees may jeopardize the lawyer's ability to represent the corporate client in future matters."

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¹ 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.

² Judge Carney issued a bench decision on February 25, 2009, and then formalized the decision in a written order issued on April 1, 2009. *United States of America v. Nicholas*, No. SACR 08-00139-CJC, -- F. Supp. 2d --, 2009 WL 890633 (C.D. Ca. Apr. 1, 2009). The Corporate Counsel Section of the New York State Bar Association recently published a companion article addressing Judge Carney's bench decision, written prior to the court's issuance of the April 1, 2009 memorandum decision and order. See Shari A. Brandt & James Q. Walker, Can an Upjohn Warning Avoid Representational Ambiguity, NYSBA Inside 4 (Spring/Summer 2009).

³ The representation of Ruehle consisted of Irell accepting a subpoena on his behalf and appearing as counsel of record. *Nicholas*, 2009 WL 890633, at **4-5.

⁴ See Defendant William J. Ruehle's Memorandum of Law Re: Attorney-Client Privilege and February 23, 2009 Evidentiary Hearing at 5 -6, *United States v. Nicholas*, No. SACR 08-139-CJC (C.D. Cal. Feb. 20, 2009); 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 *Nicholas*, 2009 WL 890633, at *7.

⁶ *Id.*, at *8.

⁷ *Id.*

Circuit cautioned attorneys to avoid “watered-down” Upjohn warnings, and ultimately concluded that no attorney-client relationship had been formed because the statement was distinct from “we *do* represent you.”⁸ The Court also noted the “legal and ethical mine field” presented where there is ambiguity, even after a proper Upjohn warning, as to whether the company’s lawyers also represent the individuals who received the warning:

Had the investigating attorneys, in fact, entered into an attorney-client relationship with [the employees] . . . they would not have been free to waive the [employees’] privilege when a conflict arose . . . [T]hey could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences. Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees.⁹

The *Nicholas* decision also suggests that both outside and in-house counsel need to think carefully about whether simultaneous representation of a company and one of its employees may jeopardize the lawyer’s ability to represent the corporate client in future

matters.¹⁰ Although the nature of any attorney-client relationship between Irell and Ruehle at the time of the interview is unclear, it is plain that the lawyers had not intended to represent Ruehle during the investigation it conducted on behalf of the company. Judge Carney’s decision substantially raises the bar on what lawyers must do to communicate effectively that they represent the company and not the individual employee who is being interviewed. The decision suggests that a court may have “serious doubts” about whether an Upjohn warning was given in the absence of a written record of the warning, and that, under the circumstances Irell faced, a lawyer representing a company needs to obtain a *written* conflict waiver from the employee if it wants to suspend or dissolve an existing attorney-client relationship and to waive the privilege that otherwise applies.¹¹

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

The situation faced by Irell may be unique because several facts substantially undermined Irell’s ability to disclaim its representation of Ruehle individually. These include Irell’s dual representation of Ruehle and the company in a prior litigation (with Ruehle’s consent); Irell’s concurrent representation of Ruehle and the company in several pending lawsuits concerning the same topic as the investigation; Irell’s course of communication with Ruehle during the

⁸ *In re Grand Jury Subpoena*, 415 F.3d 333, 340 (4th Cir. 2005).

⁹ *Id.*

¹⁰ Another complaint filed recently also strongly suggests that law firms need to be very clear as to who they represent when they interact with a company’s officers in an internal investigation or regulatory proceeding. See Complaint, *Pendergest-Holt v. Sjoblom and Proskauer Rose, L.L.P.*, No. 3:09-cv-00578 (N.D. Tex. Mar. 30, 2009). In the *Pendergest-Holt* action, Pendergest-Holt, then the chief investment officer of Stanford Financial Group, testified before the SEC in connection with the investigation of Stanford’s alleged Ponzi scheme. According to the complaint, a Proskauer Rose partner, Thomas Sjoblom, stated during Pendergest-Holt’s SEC testimony that he represented Stanford Financial Group, and that he also represented Pendergest-Holt in her capacity as an officer or director of one of the Stanford affiliated companies; Sjoblom did not state that he represented Pendergest-Holt in her individual capacity. In her complaint, Pendergest-Holt states that she understood Sjoblom’s statement to mean that he represented her individually in the SEC testimony. The complaint also states that mid-testimony, Sjoblom learned from his office that his retainer agreement called for him to represent the Stanford Group and its related companies, as well as the Stanford Group’s officers and directors, but not Pendergest-Holt in her individual capacity. The complaint states that despite learning that information, Sjoblom did not alert Pendergest-Holt or advise her that (a) she needed separate representation, (b) she had Fifth Amendment rights, (c) there were risks associated with testifying before the SEC, or (d) her communications with Proskauer and Sjoblom were not protected by the attorney-client privilege. Approximately two weeks following the deposition, Pendergest-Holt was arrested and charged by the Department of Justice with obstructing an investigation into the Stanford Group. See *id.*; see also Kara Scannell, *For Corporate Lawyers, There’s Just One Client*, Wall Street Journal, Apr. 13, 2009, at B1; Erin Fuchs, *Stanford Exec Sues Proskauer Atty For Malpractice*, Securities Law360, Mar. 30, 2009.

¹¹ *Nicholas*, 2009 WL 890633, at *6. What is unclear after Judge Carney’s decision is whether an oral Upjohn warning is 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 working on a report on recommendations for company counsel, and we will be interested to see if the Task Force addresses this issue.

investigation; and Irell’s separate financial investment in Broadcom.¹² However, these complicating facts do not diminish the need for in-house counsel and outside company counsel to take steps to avoid the bad 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.

First, lawyers representing a corporate client should issue a proper Upjohn warning and create contemporaneous evidence that the warning was provided whenever the lawyers meet with the corporate client’s employees. This is absolutely necessary whenever the lawyer has been retained by the company to perform an internal investigation of potential misconduct by corporate employees.

Second, when the lawyer has been able to determine that (i) an employee has not engaged in misconduct, (ii) the interests of the employee and the company are aligned, and (iii) it would serve the interests of the corporate client and the employee to provide common representation in a civil or criminal proceeding, the lawyer may represent the employee and the company concurrently pursuant to an advance waiver of conflicts.¹³ Indeed, the New York City Bar Association approved advance waivers of conflicts in an ethics advisory opinion issued in 2006, 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 (provided the client is in a position to understand the risks and advantages); and (ii) a disinterested lawyer would believe that the law firm could competently represent the interests of all affected clients.¹⁴ Similarly, courts have upheld advance waivers of conflicts where the client consented to the waiver after full and reasonable disclosure.¹⁵ It may be permissible for an advance conflict waiver to provide that each client consents to the lawyer’s continued representation of one client in the event that the lawyer ceases to represent the other client to avoid “representing differing interests.”¹⁶

Accordingly, whenever outside or in-house attorneys who represent a 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 lawyer represents the company and not the individual employee; the interview is protected 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.

¹² *Nicholas*, 2009 WL 890633, at **4-5.

¹³ We do not recommend jointly representing a company along with one or more of its employees in connection with an internal investigation. Even if it becomes clear after interviewing the employee pursuant to a proper Upjohn warning that the employee did not engage in any misconduct, the dual representation itself may taint the integrity of the investigation performed. Once the internal investigation is concluded, however, it may be possible to represent the company and one or more of its employees in related civil or regulatory proceedings after all of the facts learned in the course of the investigation are considered and the risks and benefits to the affected parties are weighed.

¹³ N.Y. City Bar Comm. on Professional and Judicial Ethics, Op. 2006-1 (2006); see also James Q. Walker, *Advance Waivers of Conflicts of Interest*, Introducing Lessons in Ethics and Civility 9-10 (Apr. 2009) (providing guidance on obtaining a valid conflict waiver).

¹⁴ *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”).

¹⁵ Rules of Professional Conduct 1.7(a)(1); see N.Y. State Bar Ass’n Comm. on Professional Ethics, Op. 823 at ¶ 13 (2008) (“The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently.”).

¹⁶ While taking care not to dilute the Upjohn warning, the lawyer may also indicate that he or she has not learned any facts which suggest that the interests of the employee and the employer are in conflict, if this is true.

- 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 by advising the employee that he or she may wish to secure individual counsel, but providing no other advice.¹⁷
- Consider obtaining the employee's written acknowledgement that an Upjohn warning was provided at the outset of the meeting. One way to accomplish this is to give the employee a copy of the warning on a pre-printed sheet, review the warning with the employee, and obtain the employee's written acknowledgment that he or she read and understood the warning.
- Memorialize the specific and detailed recitation of the Upjohn warning in all notes from interviews and in any subsequent interview memoranda.

If outside or in-house counsel has determined that an employee has not engaged in misconduct, that the interests of the employee and the company are aligned, and that it would serve the interests of the corporate client and the employee to retain common representation in a matter, the lawyer should memorialize the representation 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,¹⁸ 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) in 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;
- 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 that 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 carefully consider the potential impact of that simultaneous representation on the ability to protect the company's privilege in future investigations and litigations, and then proceed with the

¹⁷ While taking care not to dilute the Upjohn warning, the lawyer may also indicate that he or she has not learned any facts which suggest that the interests of the employee and the employer are in conflict, if this is true.

¹⁸ See Rules of Professional Conduct 1.7(b)(4).

representation only after entering into the form of engagement letter outlined above.

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If you have any questions regarding the matters discussed in this memorandum, please call your usual contact at Richards Kibbe & Orbe LLP or one of the persons listed below.

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