# Ninth Circuit's Reversal of Evidence Exclusion in Broadcom Case Does Not Alter Lessons Learned Regarding *Upjohn* Warnings

By Shari A. Brandt and James Q. Walker

**I. Overview**

Earlier this year we circulated a memorandum discussing the implications of the suppression order issued in *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Ca. Apr. 2009), on the administration of *Upjohn* warnings.[1] In that decision, Judge Cormac J. Carney ruled that statements made by Broadcom's CFO to Broadcom's lawyers during an internal investigation were protected from disclosure by the attorney-client privilege because the CFO reasonably believed the lawyers also represented him, he intended the statements to be confidential, and he never consented to the disclosure. Accordingly, Judge Carney excluded Ruehle's statements to Irell from the government's evidence.[2]

On September 30, 2009, the Ninth Circuit in *United States v. Ruehle*, Slip. Op. (9th Cir. Sept. 30, 2009), reversed Judge Carney's decision. The Ninth Circuit concluded that Judge Carney applied the wrong standard in evaluating whether the communications at issue were privileged.[3] Under the standard set by the Ninth Circuit, it was evident that Broadcom's CFO had no expectation that his statements would be kept confidential and, therefore, no privilege applied.[4] In light of the Ninth Circuit's reasoning, however, we believe that the key lessons discussed in the aftermath of Judge Carney's opinion still apply: lawyers conducting interviews of company employees need to provide complete *Upjohn* warnings, document the warnings issued, and not undertake dual representations without obtaining written engagement letters and conflict waivers.

**II. *United States v. Ruehle***

In *United States v. Nicholas*, Judge Carney ruled that statements made by Broadcom's CFO, William Ruehle, to Irell & Manella during an internal investigation were protected from disclosure by the attorney-client privilege because of Irell's dual representation of both Broadcom and Ruehle.[5] After conducting an evidentiary hearing, Judge Carney precluded the Government from using Ruehle's statements to Irell as evidence to support its indictment of Ruehle. Judge Carney also referred Irell to the California State Bar for "appropriate discipline".[6]

In reviewing the district court's decision, the Ninth Circuit found that Judge Carney's factual finding that Irell was representing both Broadcom and Ruehle, individually, at the time when Irell interviewed Ruehle as a part of an internal investigation on behalf of Broadcom was not clearly erroneous.[7] The Ninth Circuit disagreed, however, with Judge Carney's analysis of what protection should be applied to the communications that Ruehle had with Irell. The panel concluded that the district court had erred when it applied California state law, which provides that all communications made in the course of an attorney-client relationship are presumed to

[1] See *Upjohn v. United States*, 449 U.S. 383, 386-96 (1981) (holding that attorney client privilege can be maintained between a company and its attorneys even though communications have occurred between counsel and third-party employees when certain conditions are satisfied).

[2] At the time of the internal investigation, Irell was counsel of record for Broadcom and for a number of Broadcom management employees, including Ruehle, in connection with a then un-related civil litigation and in connection with prior litigation. Slip Op. at 4 n.2, 10-11.

[3] Slip Op. at 17-18.

[4] Slip Op. at 9, 19.

[5] 606 F. Supp. 2d at 1112.

[6] *Id.*

[7] Slip Op. at 14.

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**Memorandum**

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"[A]ttorneys need to provide and document complete *Upjohn* warnings … and … should not undertake dual representations without obtaining conflict waivers in writing."

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be confidential.[8] The panel stated that the district court instead should have applied the stricter federal common law standard, which involves an eight part test to determine whether information is covered by the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.[9]

Applying the eight part test quoted above, the Ninth Circuit concluded that Ruehle failed to prove the fourth element of the test, i.e., he did not meet his burden of establishing that his statements to Irell during the internal investigation were made "in confidence."[10] Indeed, the evidentiary record established that Ruehle not only knew from his direct participation in the investigation as CFO that statements made to Irell would be disclosed to the company's auditors, but Ruehle was also present during several of the meetings where Irell provided the information it learned to Broadcom's auditors.[11] Significantly, Ruehle did not object to the disclosure of his statements until nearly two years later after the same information was also shared with securities regulators and the Department of Justice.[12] The Ninth Circuit concluded that Ruehle could not plausibly claim that he had any expectation that his statements to the Irell lawyers during his interview would be kept confidential.[13]

Notably, the Ninth Circuit did not review the district court's ruling that the Irell attorneys had violated state ethical rules by undertaking the dual representation of Ruehle and Broadcom without obtaining a written conflict waiver.[14] In stating that the issue was not before the panel on appeal, the Ninth Circuit commented that the conduct, if true, was "troubling", but also added that even if true the conduct would not have provided an adequate basis for excluding Ruehle's statements to Irell from evidence.[15]

### III. Lessons Learned

Although the Ninth Circuit reversed the suppression order issued in *United States v. Nicholas*, the key lessons from the district court's opinion still apply: attorneys need to provide and document complete *Upjohn* warnings when conducting employee interviews, and attorneys should not undertake dual representations without obtaining conflict waivers in writing.

The Ninth Circuit's decision focused on whether Ruehle understood that the information provided to the Irell lawyers might be disclosed to others, and, therefore, would not be kept in confidence. The panel ultimately concluded that given the nature of Ruehle's position (CFO) and the extent of his participation in the investigation and interaction with the company's auditors, that Ruehle could not have believed that the information he provided to the Irell attorneys would be kept in confidence. The court may very well have found differently if the communications had been from an employee who was less apt to understand the likelihood of disclosure, who was not present when

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[8] Slip. Op. at 17-18.

[9] Slip Op. at 16 (*quoting In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992) (other citations omitted)).

[10] Slip Op. at 9, 19.

[11] Slip Op. at 8, 20-23 (summarizing testimony that Ruehle was aware that Irell would share the factual information it gathered with the company's auditors, that it was Ruehle who introduced the auditors to Irell, and that Ruehle participated in the planning, investigatory and disclosure stages of the internal investigation). The panel also noted that Ruehle was not an ordinary employee, but rather was the CFO for a sophisticated public, corporate enterprise, and that his duties -- which included interacting with Broadcom's auditors -- prevented him from being able to claim credibly after the fact that he was not aware that the company would need to report the information it learned from him to its outside auditors and to the SEC. Slip Op. at 21

[12] Slip Op. at 9, 24-25.

[13] The Circuit also added that even if Ruehle had subjectively believed that some of the information he had conveyed to the Irell attorneys was confidential, Ruehle failed, as was his burden, to make any effort to parse his statements to distinguish those he contended were privileged. Slip Op. at 18-19.

[14] Slip Op. at 28-30.

[15] *Id.* (suppression should not have been considered in the absence of evidence that the government had encouraged, was complicit in, or at least was aware, of any breach of ethical obligations by Irell).

some of the information was disclosed, and who did not wait two years to object to the disclosure.

Although the Ninth Circuit reversed the district court's order of suppression, the panel upheld the district court's finding that Ruehle must not have been given an *Upjohn* warning by Irell in light of the evidence that the Irell lawyers "took no notes nor memorialized their conversation on this issue in writing."[16] This portion of the panel's opinion reinforces the district court's prior warning that *Upjohn* warnings must be clear and must be documented in writing.

The Ninth Circuit also commented that it was troubled by the concept that a dual representation would be undertaken without a written conflict waiver.[17] This portion of the panel's opinion reiterates the observations in our prior client memorandum that dual representations should not be undertaken without entering into a written engagement letter signed by the employee and containing an advance conflict waiver.[18] The engagement letter should provide that information from the employee will be shared with the company, and that the company may decide, in its sole discretion, to share that information with others, including the government.[19]

In sum, lawyers should provide complete *Upjohn* warnings, which should be documented in contemporaneous notes and in subsequent interview memoranda. Additionally, whenever a dual representation of a corporate client and one or more of its employees is contemplated, lawyers should carefully weigh the risks and benefits, and then make sure to obtain a written engagement letter that makes it plain that the corporation has the discretion to disclose to third parties the information communicated, including to the government; provides an advance conflict waiver; and provides the employee will not move to disqualify the lawyer from representing the corporation in the future.

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[16] Slip Op. at 7 n.3.

[17] Slip Op. at 28-30.

[18] As we stated in our prior memorandum, 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, 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).

[19] When considering whether to undertake a dual representation, outside or in-house counsel must first determine that the employee has not engaged in misconduct, that the interests of the employee and the company are aligned and that it would serve in the interests of the corporate client and the employee to retain common representation. If all those conditions are satisfied, the lawyer should take care to memorialize the representation in a written engagement letter, signed by the employee, that: (1) defines the scope of the representation, (2) defines the lawyer's concurrent representation of the corporation, (3) states the risks and advantages of the concurrent representation, (4) states that the information learned from the employee will not be kept confidential from the corporation, and may be shared, in the corporation's sole discretion, with third parties, including the government, (5) provides that the employee waives any conflict that may arise in the future with respect to the lawyer's representation of the corporation and (6) provides that the employee agrees not to move to disqualify the lawyer from representing the corporation in the future.