28

CLIENT CONFUSION ON CORPORATE COUNSEL'S ROLE: NEW DEVELOPMENTS IN THE ETHICAL AND LEGAL MINEFIELD OF CONDUCTING INTERNAL INVESTIGATIONS

David Hess

University of Michigan

November 2009

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

INTRODUCTION

Conducting an internal investigation is a "potential legal and ethical minefield"[1] for outside counsel. Corporate employees[2] often misunderstand the investigating counsel's role and believe he is representing their personal interests along with the corporation's interest. In other cases, employees hide behind such a claimed misunderstanding in an attempt to prevent the disclosure of their communications with counsel to third parties, including the government. Counsel, of course, wants employees to fully cooperate with the investigation, and employees are often threatened with termination of employment for not cooperating. Thus, attorneys must struggle with informing interviewees' of their rights, such as their right not to speak to the attorney or to have their own attorney present (and possibly paid for by the corporation) during the interview, but at the same time encouraging them to answer all questions honestly and fully. Complicating matters, at the time of an initial interview, counsel may not know if the corporation's and the employee's interests are adverse or aligned. If the interests are potentially aligned, then the attorney may be looking forward to the possible use of a joint defense agreement between the corporation and the employee or perhaps even dual representation. However, describing this possibility to an employee will likely only further confuse the employee on whose interests the attorney represents.

Two recent cases highlight these challenging issues for outside counsel. Before discussing those cases, Part I provides an overview of the legal and ethical issues involved in conducting an internal investigation, including the use of Upjohn Warnings to inform interviewees' of their rights and to protect the corporation's rights. Part II first discusses a 2009 district court opinion on attorney-client privilege and the U.S. Court of Appeals for the Ninth Circuit's decision overturning that ruling. This case involved attorney interviews of the Chief Financial Officer (CFO) during an internal investigation of stock option back-dating practices at Broadcom. The CFO claimed that the substance of those interviews was disclosed to the government without the CFO's required consent. The second case involved a lawsuit for malpractice and breach of fiduciary duties filed by the Chief Investment Officer (CIO) of the Stanford Financial Group against the attorney representing the Stanford Group. The CIO claimed that the attorney led her to believe that he was representing her personal interests in addition

1. *In re: Grand Jury Subpoena*, 415 F.3d 333, 340 (4th Cir. 2005).
2. For purposes of this paper, I use the term "employees" to include corporate officers, which are the subjects of the recent cases discussed in Part II.

to the company's interests. She claimed the attorney then failed to protect her rights, which resulted in her being indicted for obstruction of an SEC investigation. Part III reviews some of the lessons of those cases.

I. UPJOHN WARNINGS AND INTERNAL INVESTIGATIONS

A. Upjohn Warnings

Before conducting an interview with a company employee during an internal investigation, counsel should inform the employee of the basic "ground rules" of the interview.[3] Included in those ground rules should be what is known as an "Upjohn Warning," which is named after *Upjohn v. United States*.[4] In that case, the Supreme Court established that attorney-client privilege could apply to communications with any employee in the organization, and not just the members of the "control group." The warning informs an employee that the attorney represents the company and not the employee, that the attorney is conducting the interview so that he has the facts he needs to provide legal advice to the company, and that any statements made during the interview are subject to an attorney-client privilege held solely by the company. In addition, the warning should state that the company may choose to waive that privilege and disclose the substance of the interview to the government or any other third party at its discretion.

From the corporation's perspective, this warning ensures that the corporation has complete control over information obtained during the interview, including the decision of whether or not to disclose the information to any government agency. The warning accomplishes this by refuting an employee's claim that she had an attorney-client relationship with the attorney and that the statements are subject to a privilege which she holds.[5]

Although the Upjohn Warning protects the corporation, there is an issue of whether the warning goes far enough in protecting the employee's rights. Employees face significant pressures to cooperate with an investigation even if cooperation may not be in their best long-term interests. Because an employee has a duty to disclose

3. Randall J. Turk & Mark Miller, *The Witness Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 93, 103 (Barry F. McNeil & Brad D. Brian 2007).
4. 449 U.S. 383 (1981).
5. Turk and Miller, *supra*, at 103.

information to her employer[6] and may face termination of employment for not cooperating with an investigation, the employee may decide to cooperate without understanding the potential consequences of that cooperation. Such consequences would include having the government prosecute the employee based on statements made to outside counsel. Thus, the attorney is in the difficult position of not wanting to dissuade an employee from cooperating with an internal investigation, but at the same time wanting to ensure that the employee has the opportunity to make a fully informed decision on how she chooses to proceed.

The pressure on the attorney to obtain employee cooperation in the internal investigation is considerable, since the government provides significantly more lenient treatment to corporations that cooperate with the government. If employees do not provide full information during the interview, then cooperation with the government is difficult. In addition, if the employee is able to establish that she has attorney-client privilege in the interview statements, she can then prevent the corporation from gaining cooperation credit by waiving its privilege and providing the government with the contents of the interview.

Because of the potential of employees to not understand the consequences of cooperation and the pressure on attorneys to gain cooperation, some argue that the standard Upjohn warning should be expanded. For example, Judge Frederick B. Lacey has argued in favor of an "Adnarim" warning (which is Miranda spelled backwards).[7] The Adnarim warning would expand the Upjohn warning to include explicitly telling employees that they have the right to have their own attorney present during the interview and the right to refuse to talk to the company's attorney.[8] Others argue that the Adnarim warning should not be given in all cases, but only after the attorney determines that it is necessary. However, this may be after an attorney has conducted an initial fact finding interview to determine what any particular employee knows.[9]

6. See *United States v. Stein*, 463 F.Supp.2d 459, 461 (S.D.N.Y. 2006) ("an employee, like any other agent, owes the employer a duty to disclose to the employer any information pertinent to the employment."); *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001) (an "employee has a duty to assist his employer's counsel in the investigation and defense of matters pertaining to the employer's business.")
7. Turk and Miller, *supra*, at 106.
8. Id.
9. Id.

More recently, some attorneys have started warning employees that they may be prosecuted for obstruction of justice if they mislead the attorney's investigation and the employee's false information is later provided to the government. The government is able to establish an obstruction of justice claim based on the argument that the employee knowingly made a false statement to the attorney while knowing that those statements would be passed on to the government.[10]

B. Upjohn Warnings and the Attorney-Client Relationship

An Upjohn warning is not required to prevent an attorney-client relationship from forming with an interviewee employee,[11] and the failure to give one does not necessarily create a presumption that an attorney-client relationship exists. Attorneys developed the Upjohn warning to protect the corporation's interests by creating a strong presumption that an attorney-client relationship does not exist. However, an attorney also has professional responsibilities in these situations. The *Model Rules of Professional Conduct* Rule 1.13(f) states, "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." When dealing with an unrepresented person, the Model Rule 4.3 requires the attorney to correct any misunderstandings that the employee may develop with respect to the attorney's role in the matter.[12] Thus, in some situations, there is a professional responsibility to give some form of an Upjohn warning.

10. See George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 985-86 (describing the government's use of this tactic against company officers at Computer Associates).
11. See *Stein*, 463 F.Supp.2d at 461.
12. Rule 4.3 states:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Apparently, because Rule 1.13(f) states that the lawyer shall explain the identity of the client when the "lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents," some attorneys are giving "watered-down" Upjohn warnings in an effort to ensure full cooperation from employees. That is, until the attorney has assured himself that employee's interests are adverse to the corporation, the attorney explicitly leaves open the possibility that the attorney can represent the employee in this matter in the future. This can cause employees to be confused on the attorney's current role during the interview (e.g., is the attorney acting on behalf of the corporation or is he determining if he can represent my interests?). Once the attorney determines that the company and the employee have adverse interests (which would likely be after or during the employee interview), then the attorney provides a more explicit warning that he is acting only on behalf of the corporation and the employee may wish to consult with her own attorney.

With respect to the issue of whether or not the attorney has a professional obligation to inform the employee of her right to have her own attorney present, Comment 10 to Rule 1.13 states:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Comment 11 then states, "Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case."

In re: Grand Jury Subpoena[13] provides one example of a watered down Upjohn warning. In that case, AOL Time Warner's counsel interviewed several employees during the course of an internal investigation. Prior to an interview, the attorneys told one employee, "We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege

13. 415 F.3d 333 (4th Cir. 2005).

belongs to the company."[14] However, the attorneys went on to state that they "represented AOL but that they 'could' represent him as well, 'as long as no conflict appeared.'"[15] Similar warnings were given to other AOL employees, such as stating, "We represent AOL, and can represent [you] too if there is not a conflict."[16] The employees also were told that they could consult with their own lawyer at any time, though, on at least one occasion, counsel told an employee that "he did not recommend it."[17]

Although the court held that no attorney-client privilege was established with the employees, [18] the court stated, "We note, however, that our opinion should not be read as an implicit acceptance of the watered-down 'Upjohn warnings' the investigating attorneys gave the appellants. It is a potential legal and ethical minefield."[19] In other words, counsel must be careful about how they describe these representation issues to employees. Although it is accurate to state that counsel could represent the employee if counsel determines that the employee does not have a conflict of interest with the company, an unclear description of that situation could cause the employee to reasonably misunderstand the situation. It would not be unexpected for an employee to believe that counsel is representing the employee's personal interests until the attorney makes the factual determination that there is a conflict that would prohibit representation.

C. Problems of Dual Representation

If counsel is intentionally representing both the company and one or more employees, additional complications arise. As stated above, the Upjohn warning is designed, in part, to prevent the employee from establishing a belief she has an attorney-client relationship with counsel. In some cases, however, when the company's and the employee's interests appear to be aligned, counsel may intend to represent both parties. Under Model Rule 1.13(g), a lawyer may represent both the

14. Id. At 336.
15. Id.
16. Id.
17. Id.
18. Id at 340. The court stated, "As the district court noted, "we *can* represent you" is distinct from "we *do* represent you." If there was any evidence that the investigating attorneys had said, "we *do* represent you," then the outcome of this appeal might be different. Furthermore, the statement actually made, "we *can* represent you," must be interpreted within the context of the entire warning" [emphasis in original].
19. Id at 340.

company and an employee if that representation is consistent with Model Rule 1.7 on conflicts of interest with current clients. Under Model Rule 1.7(a), a lawyer may not represent the employee if representation of the company would be "directly adverse" to the employee, or "there is a significant risk that the representation of [the employee] will be materially limited by the lawyer's responsibilities to [the company]."[20] Even if there is a current conflict of interest under Rule 1.7(a), the lawyer may provide dual representation, if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and "each affected client gives informed consent, confirmed in writing."[21]

Some are skeptical that dual representation would work in the context of a company conducting an internal investigation. For example, the court in *In re: Grand Jury Subpoena* stated, "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."[22] The court went on to state that if dual representation was established, counsel "would not have been free to waive the [employee's] privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all

20. Rule 1.7(a).
21. Rule 1.7(b). Rule 1.7(b) establishes four requirements. In addition to the two requirements mentioned in the text associated with this footnote, there are the requirements that the representation cannot be prohibited by law and "the representation [can] not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §131 "Unless all affected clients consent to the representation under the limitations and conditions provided in §122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §122(1) states: "A lawyer may represent a client notwithstanding a conflict of interest prohibited by §121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client."
22. 415 F.3d at 340.

representation and to maintain all confidences."[23] In light of those comments, counsel would want to avoid dual representation until after the investigation is completed and counsel can make an informed judgment as to whether there are any current or potential conflicts between the company and the employee.

II. NEW DEVELOPMENTS IN 2009

In 2009 there were two major cases that highlighted the legal and ethical challenges in conducting internal investigations. The first case involved an internal investigation into Broadcom Corp.'s stock option granting practices. During the stock option backdating scandals of 2006 and 2007, Broadcom was one of the worst offenders and had to restate its financial reports to add $2.2 billion to its compensation costs.[24] Broadcom's CFO made various statements about the stock option practices to outside counsel conducting the internal investigation. Broadcom then disclosed the information obtained from the CFO to its external auditor and the government. The CFO claimed attorney-client privilege and moved to suppress his communications to counsel. The district court granted the motion, but that ruling was reversed on appeal. The second case involves the CIO of the Stanford Financial Group. She claimed that she had an attorney-client relationship with outside counsel and that he failed to protect her rights, which resulted in the government indicting her for obstruction of an SEC investigation and conspiracy to obstruct.

A. Ruehle Cases

The district court case *United States v. Nicholas*[25] received significant attention at the time and was very controversial. The appeals court ruling that reversed the lower court ruling brings to light facts that were not reported in the district court case. To highlight these issues, this section discusses the two cases separately and the discussion of the district court case only includes the facts presented in that ruling.

1. The District Court Case

Starting in 2002, Irell & Manella LLP ("Irell") provided legal representation for Broadcom Corp. and its Chief Financial Officer,

23. Id.
24. E. Scott Reckard, *Trial begins for former Broadcom finance chief*, LOS ANGELES TIMES, October 24, 2009.
25. *United States v. Nichols*, 606 F. Supp. 2d 1109 (C.D.Cal. 2009).

Mr. Ruehle, in several securities-related matters.[26] During the course of one of those matters (a warrant litigation), Irell informed Mr. Ruehle in writing of the potential conflicts of interest of Irell representing both Broadcom and Mr. Ruehle. In response, Mr. Ruehle gave informed consent in writing to Irell for it to provide representation.[27] That litigation ended by the end of 2005.

In May 2006, Broadcom became concerned about the possibility that it may become subject to a government investigation or a shareholder suit with respect to its stock option granting practices and retained Irell to investigate those practices.[28] Shortly thereafter (on May 25 and May 26), a shareholder derivative suit was filed against Mr. Ruehle and other Broadcom officers based on the corporation's stock option grants, and an existing shareholder suit was amended to include those stock option practices. At some point, Irell agreed to represent both Broadcom and Mr. Ruehle in these two suits. The parties dispute when the relationship began, but they do agree that Irell represented Mr. Ruehle in these two actions and that representation ended in September 2006.[29] Unlike the warrant litigation, however, Irell did not obtain Mr. Ruehle's written informed consent for dual representation, as required by California's Rules of Professional Conduct.[30] Thus, Irell represented Broadcom in the internal investigation and two shareholder suits (all involving the stock option granting practices in some way) and Mr. Ruehle and other officers in the two shareholder lawsuits, but there was a dispute as to whether or not Irell represented Mr. Ruehle with respect to the internal investigation.

In the week after the suits were filed, Irell sent emails to Mr. Ruehle that updated him on Irell's investigation, including its interviews of witnesses. Then, on June 1, 2006, two Irell attorneys interviewed Mr. Ruehle regarding the stock option grants, but they did not tell him that: (a) they were not his lawyers; (b) he may want to consult with an attorney before being interviewed; and (c) his statements in this interview (and subsequent conversations) may be disclosed to third parties.[31]

26. Id. at 1112.
27. Id.
28. Id. at 1112-13.
29. Id. at 1113 n.3.
30. Id. at 1113.
31. Id.

On June 13, 2006, the SEC began an investigation of Broadcom. Over the next two months, Mr. Ruehle received various forms of legal advice from Irell attorneys.[32] In August 2006, Irell attorneys—under the direction of Broadcom—disclosed statements made by Mr. Ruehle during his Irell interviews to Ernst & Young (Broadcom's outside auditors), the SEC, and the U.S. Attorney's Office.[33] It was not until December 2008 that Mr. Ruehle learned that his interview statements would be used against him by the government.[34] Mr. Ruehle then claimed that his communications with Irell were privileged statements.

The court held that Mr. Ruehle's statements were privileged attorney-client communications and ordered that those statements be suppressed in the government's case against Mr. Ruehle.[35] The court stated that "[d]etermining whether an attorney-client relationship exists depends on the reasonable expectations of the client."[36] The client must believe that he is consulting a lawyer under an attorney-client relationship and must show "that the communication was made in order to obtain legal advice."[37] The court also made clear that it would not distinguish between a "fact-finding" interview by an attorney and a conversation that provides the client with professional advice, because the "fact-finding" is necessary to provide legal advice.[38]

The court found that there was "no serious question" that an attorney-client relationship existed between Mr. Ruehle and Irell.[39] First, Broadcom's general counsel sent Mr. Ruehle an email (which was copied to Irell) indicating that Irell would be representing him personally in litigations related to stock option grants.[40] This email was followed immediately (four minutes later) by an email from Irell to Mr. Ruehle asking to set up an interview date and time to discuss the company's stock option granting practices.[41] Second, also before the June 1, 2006, interview, an

32. Id. at 1114.
33. Id.
34. Id.
35. Id. at 1112.
36. Id. at 1114.
37. Id. at 1115.
38. Id. (citing *Upjohn Co. v. United States, 449 U.S. 383, 390-91, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*
39. Id.
40. Id. at 1115.
41. Id. at 1115-16.

Irell attorney sent emails to Mr. Ruehle that outlined legal strategy and directly asked Mr. Ruehle to obtain and review specific information.[42] At no time was Mr. Ruehle asked if he would want an attorney present to represent his personal interests.[43] Thus, it was reasonable for Mr. Ruehle to believe that Irell was interviewing him to both collect facts for his personal defense and as part of Broadcom's internal investigation.[44]

The court also stated that Mr. Ruehle clearly intended for his statements during the interview to be kept confidential. Mr. Ruehle had "substantial prior experience with civil litigation" as a corporate officer, and he knew that he was also being personally investigated with respect to the stock option granting practices.[45] Thus, "he would never have agreed to provide information that Irell could then turn over to the government should it commence a criminal investigation of him."[46] As discussed below, the appeals court took a significantly different view of what Mr. Ruehle's experience meant in determining if he knew that his statements would be disclosed to third parties.

Impact of an Upjohn warning. Although the court doubted that Mr. Ruehle had ever received an Upjohn warning, it would not have changed the outcome of the case.[47] The court's doubts on whether Mr. Ruehle had received a warning were based on Mr. Ruehle's testimony and the lack of any written record (including the Irell attorneys' notes) that the attorneys gave a warning.[48] In addition, the Irell attorneys' testimony on the warning they gave failed to meet the Upjohn standards. According to the testimony of one of the Irell attorneys, he told Mr. Ruehle only that he was interviewing Mr. Ruehle on behalf of Broadcom for the internal investigation. [49] He did not tell Mr. Ruehle that they were not his lawyers or that his statements may be shared with third parties.[50]

The court went on to state that even if a warning was giving, it would not have mattered because an attorney-client relationship

42. Id. at 1115.
43. Id. at 1116.
44. Id.
45. Id.
46. Id.
47. Id. at 1116-17.
48. Id. at 1116.
49. Id. at 1117.
50. Id.

existed between Irell and Mr. Ruehle.[51] An Upjohn warning is for a non-client to ensure that the individual understands that they are not a client of the attorney. Here, Mr. Ruehle was a client of Irell with respect to the same subject matter of the internal investigation. In this situation "[a]n oral warning to a current client that no attorney-client relationship exists is nonsensical at best—and unethical at worst."[52] Instead, the client would have to give a written waiver related to the conflict of interest created by dual representation.[53]

Irell's breach of its duty of loyalty. An attorney owes a duty of undivided loyalty to his client. The court found that Irell violated this duty in three different ways. First, because Irell was representing both Broadcom and Mr. Ruehle with respect to the stock option granting practices and those two clients' interests could conflict, Irell was required to (but did not) obtain a written informed consent from each client under California's Rules of Professional Conduct.[54] Second, Irell interviewed one client (Mr. Ruehle) for the benefit of another client (Broadcom).[55] Third, Irell disclosed privileged communications without Mr. Ruehle's consent.[56]

Due to the duty of loyalty violation, the court referred Irell to the State Bar for possible discipline and stated:

> "Irell should not have put the parties and the Court in this position. The Rules of Professional Conduct are not aspirational. The Court is at a loss to understand why Irell did not comply with them here. Because Irell's ethical misconduct has compromised the rights of Mr. Ruehle, the integrity of the legal profession, and the fair administration of justice, the Court must refer Irell to the State Bar for discipline. Mr. Ruehle, the government, and the public deserve nothing less."[57]

2. U.S. Court of Appeals for the Ninth Circuit's Decision

In *United States v. Ruehle*,[58] the court described the case as involving an exploration of "the treacherous path which corporate counsel must tread under the attorney-client privilege when

51. Id.
52. Id.
53. Id.
54. Id. at 1117-18.
55. Id. at 1119.
56. Id. at 1120-21.
57. Id. at 1121.
58. *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)

conducting an internal investigation . . . ."[59] In its opinion, the court added facts to the district court's description, and then used those facts to reverse the district court's holding that Mr. Ruehle held attorney-client privilege in his statements to the Irell attorneys.

In its decision, the court emphasized the fact that Ruehle was present at a meeting of the Board of Director's Audit Committee on May 26, 2006, when the committee determined the scope of Irell's representation and established the details of the internal investigation.[60] At the meeting, the court stated, the individuals present "made clear that the intent was to turn over the information obtained through the Equity Review to the auditors, to fully cooperate with government regulators, and, if necessary, to self-report any problems with Broadcom's financial statements."[61] In addition, the court pointed out that in late June 2006 (after the June 1 interview), Irell advised Ruehle to retain his own counsel with respect to the internal investigation and the civil lawsuits, which Ruehle did.[62] Irell did represent Ruehle on some matters in one of the civil actions in early June.[63] However, Irell claims these actions, and therefore their representation of Ruehle, did not occur until after the June 1, 2006, interview.[64]

Because the attorney-client privilege issue was a mixed question of law and fact, the court conducted a *de novo* review.[65] The court accepted the district court's finding of an attorney-client relationship between Irell and Ruehle, but stated that attorney-client privilege requires finding both the establishment of the relationship and that the communication was of a privileged nature.[66] To determine whether a communication is covered by the attorney-client privilege, the court found that the district court erred in using a California standard to make that determination instead of the more strict federal common law standard.[67] The federal common law standard is an eight-part test:

59. Id at 601.
60. Id. at 603 and 610.
61. Id. at 603.
62. Id. at 604.
63. Id. at 605-606.
64. Id. at 605.
65. Id. at 606.
66. Id. at 607.
67. Id. at 608-609.

(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.[68]

In addition, the district court erred by applying a presumption that any communication in an attorney-client relationship is privileged. Under federal common law, Ruehle had the burden to establish the privileged nature of the communication.[69] In addition, federal law disfavors "blanket claims of privilege" and may require the party asserting privilege to distinguish between privileged and non-privileged information in any communication.[70]

Applying the eight-part test and placing the burden on Ruehle, the court concluded that Ruehle's statements to Irell were not "made in confidence" as required by part four of the test.[71] The statements were not made in confidence because Ruehle knew from attending the Audit Committee meeting on May 26, 2006, that information gained from the internal investigation was to be disclosed to the outside auditor, Ernst and Young.[72] Thus, contrary to the district court's findings, as an experienced corporate officer, Ruehle had every reason to suspect that his statements would be disclosed to a third party.[73] Furthermore, after the June 1, 2006, interview, Ruehle was present at meetings where the Audit Committee directed Irell to make disclosures and at meetings where disclosures were made to the auditors.[74] There was no evidence that Ruehle ever raised an objection to these disclosures until he became aware of the possibility of individual criminal liability in 2008.[75] In addition,

68. Id. at 607.
69. Id. at 608-609.
70. Id. at 609.
71. Id.
72. Id.
73. Id.
74. Id. at 611.
75. Id. at 611.

even if it is accepted as fact that Irell breached its duty of loyalty to Ruehle, that ethical breach does not support a federal court suppressing otherwise admissible evidence, especially since the government played no role in that violation.[76]

B. Pendergest-Holt v. Proskauer Rose

The next case arose out of the Stanford Financial Group ("Stanford") scandal. Laura Pendergest-Holt was the Chief Investment Officer of Stanford. She was indicted on charges of obstruction of justice based on her testimony to the SEC in February 2009. She then filed suit against Thomas Sjoblom and the law firm Proskauer Rose LLP ("Proskauer") for malpractice and breach of fiduciary duty. Sjoblom is a partner with Proskauer, and he was present when Pendergest-Holt testified before the SEC.

In her complaint,[77] Pendergest-Holt claimed that she reasonably believed that Proskauer was representing her interests as an individual and that any communications between her and Proskauer attorneys were protected by attorney-client privilege.[78] Instead of protecting her interests, however, Proskauer acted only in the interests of Stanford (and the personal interests of Allen Stanford).[79] According to the complaint, during Pendergest-Holt's testimony, Sjoblom checked with his office to determine which parties he was retained to represent. Sjoblom confirmed that he was representing all Stanford companies and its officers and directors, but only in their roles as officers and directors and not as individuals.[80] Pendergest-Holt claims, however, that Sjoblom did not then advise her that she should seek representation for her personal interests.[81] She also claimed that Sjoblom did not inform her that her interests could conflict with the interests of Stanford, that she could decline to speak with the SEC, that she could refuse to answer a question by

76. Id. at 613. The court stated, "Irell's allegedly unprofessional conduct in counseling Broadcom to disclose, without obtaining written consent from Ruehle, while troubling, provides no independent basis for suppression of statements he made in June 2006." Id.
77. Plaintiff's Complaint, *Pendergest-Holt v. Sjoblom*, No. 3:09-cv-00578-G (N.D. Tex March 30, 2009).
78. Id. at ¶¶ 8 and 11.
79. Id. at ¶ 8.
80. Id. at ¶ 9.
81. Id.

exercising her 5th Amendment rights, and that there were potential criminal penalties associated with her testimony.[82]

Due to these factors, Pendergest-Holt claimed that Sjoblom's "actions were a clear attempt to protect other principals within the Stanford Group, to the detriment of [Pendergest-Holt's] interests."[83] In further support of this claim, Pendergest-Holt pointed to Sjoblom's statements during testimony as misleading her into believing that he represented her interests in this matter.[84] During testimony, the following exchange occurred.

> Q. Just so we're clear. As I understand your statement, you do not as far as you're concerned represent the witness here today?
>
> A. [Sjoblom]. I represent her insofar as she is an Officer or Director of one of the Stanford affiliated companies.[85]

Sjoblom later withdrew from representing Stanford and disaffirmed all prior statements made to the SEC.

Overall, Pendergest-Holt claimed that Proskauer and Sjoblom established an attorney-client relationship with her, but when they "learned that they were not authorized to represent [Pendergest-Holt] in her individual capacity and could not adequately do so, they then took no action to protect her interests . . . ."[86]

In summer 2009, the lawsuit was dismissed without prejudice.

III. LESSONS FROM THE CASES

These cases demonstrate some of the potential pitfalls that counsel may face when conducting an investigation. This part highlights some of the issues that counsel should consider.

A. Develop a Consistent Policy on Upjohn Warnings

In *Nichols*, the district court had significant doubts about whether the Irell attorneys gave Ruehle an Upjohn warning. The court had doubts, in part, because the attorneys did not have a written record that they gave a warning. Thus, one simple lesson is that attorneys should develop a consistent practice of a keeping a written record of the warning in some form. This record could be in the attorney's

82. Id.
83. Id.
84. Id. at ¶ 10.
85. Id.
86. Id. at ¶ 21.

interview notes, or the interviewee could be required to sign a document stating that she received and understood the warning. The choice of method may depend on the circumstances. For example, the attorney may decide on a written warning requirement for situations similar to the Nicholas case (e.g., a corporate officer who the attorneys have represented in prior actions), but an oral warning for lower level employees who are not suspected of engaging in the wrongdoing under investigation (and may be intimated by a formal, written warning).

In addition to a policy on how to give the warning (e.g., oral only (ideally from a written script) or written), attorneys should develop a consistent policy on the content of the warning. Flexibility can and should be built into that policy, and it should provide guidance on what factors to consider when making changes to the basic warning.

The basic Upjohn warning should include statements making the following points:

1. The attorneys conducting the interview represent only the company and not the interviewee.
2. The attorney is conducting the interview so that he has the facts he needs to provide legal advice to the company.
3. Any statements made during the interview are subject to an attorney-client privilege, but that privilege is held solely by the company. The company has complete control over whether or not to waive privilege.[87]
4. The company may decide to exercise its right to waive privilege and disclose the contents of the interview to third parties, including government agencies.

The *Nicholas* case emphasizes the importance of point number four, especially if the corporation expects to disclose the information obtained during the internal investigation to the government.

Additional warnings that an attorney may decide to give as a matter of standard policy or only when the situation calls for it include:

5. The interviewee has a right to consult with her own attorney before granting an interview, and that the interviewing attorney cannot provide her with any legal advice.

87. The interviewee also should be told to keep the substance of the interview confidential.

6. The interviewee has the right not to answer any questions. If it applies, the attorney also may state that failure to cooperate with the investigation may result in termination of the interviewee's employment.

7. The corporation may waive its privilege and disclose any information gained from the interviewee to the relevant government agency. Thus, if the interviewee gives the interviewing attorney false information and that false information is provided to the government, the government may prosecute the interviewee for obstruction of justice.

For example, in facts similar to the *Nicholas* case, where the interviewee may face criminal charges, it may be appropriate to ensure the interviewee understands that they have the right to speak to their own attorney and that the interviewing counsel will not give them any legal advice.

B. Prevent History from Creating an Attorney-Client Relationship

As stated in *Nicholas*, an Upjohn warning is only intended for non-clients, since one of the goals of giving the warning is to prevent an interviewee from believing she has an attorney-client relationship with the attorney conducting the interview. As *Nicholas* shows, if the interviewee can establish an attorney-client relationship with counsel, then due to professional responsibilities, the attorney may be required to obtain the client's informed written consent if the dual representation would have a negative impact on counsel's ability to represent both parties.

In both cases discussed here, the fact that a corporate officer was involved raised significant challenges. In the Pendergest-Holt case, some of the confusion centered on Pendergest-Holt's understanding of what the attorney meant by stating that he represented her "insofar as she is an Officer or Director of one of the Stanford affiliated companies."[88] In *Nicholas*, client confusion arose, in part, due to the fact that Irell had represented Ruehle in the past, which may be a common situation for regular outside counsel and corporate officers. Further confusion was due to Irell representing Broadcom on two civil suits and an internal investigation, which all involved the same stock option grants. Irell then attempted to represent Ruehle on the

88. Pendergest-Holt Complaint, *supra*, at ¶ 10.

two civil suits, but then treat him as a non-client for purposes of the internal investigation.[89] The *Nicholas* court, using a reasonable belief standard, did not seem to be willing to treat the two civil suits and the internal investigation as three separate representations.

At a minimum, when officers are important witnesses in the investigation, counsel should be sure to examine its current and past representations of the corporation's employees to be prepared to handle these situations appropriately. For a non-lawyer officer, it may be difficult for that person to understand why counsel represented both the corporation and the officer in a past action, but now the counsel is only representing the corporation. Such officers may require more information than is contained in the standard Upjohn warning. In some cases, the attorney must obtain written informed consent. If counsel determines that they have too close of ties to the interviewees, then they should recommend that special counsel be retained to conduct the internal investigation.

C. Remember Professional Responsibilities

As discussed above, in addition to taking actions to protect the corporation's interest, the attorney also has professional responsibilities that may apply. When dealing with a non-client who does not have representation, the attorney has an obligation to make "reasonable efforts" to clarify any misunderstandings the interviewee may have on the attorney's role.[90] A standard Upjohn warning should correct any misunderstandings. However, courts may consider the entire circumstances surrounding the warning. For example, the "watered-down" Upjohn warnings discussed earlier may help create a misunderstanding rather than clarify the representation issues.

The comments to Rule 1.13(f) state that when the attorney determines that the interviewee has interests that may be adverse to the company (the client), the attorney has an obligation to inform the interviewee that they may want to obtain their own representation. This goes beyond the standard Upjohn warning that clarifies the attorney's role as only representing the company. Attorneys should keep this in mind when conducting an interview. If at some point during the interview the attorney determines that the interviewee has interests adverse to the corporation, then the attorney should stop the interview and provide this information to the interviewee.

89. In addition, at least one of the same attorneys was involved in all three actions.
90. *Model Rules of Professional Conduct* Rule 4.3.