



**Internal Investigations: Traps for Corporate Counsel Interviewing
Corporate Employees**

Jack E. Fernandez, Esquire
David J. Lisko, Summer Associate
Zuckerman Spaeder LLP
Tampa, FL

This Executive Summary addresses federal law applicable to corporate employee claims of privilege in their communications with corporate counsel. Generally, corporate employees who seek to claim a privilege over their communications with corporate counsel must make a threshold demonstration of specific communications that were intended to remain confidential. For a corporate employee who has made this threshold showing, some circuits will measure the employee's privilege assertion against a stringent test that erects an absolute bar to any corporate employee's assertion of privilege as to any communication that concerns matters within the company or the general affairs of the company. Certain circuits have not adopted this more stringent test and require the corporate employee to demonstrate an objectively reasonable belief that communications with corporate counsel were intended to remain confidential. However, irrespective what test is applied, an attorney representing a corporation who provides inadequate *Upjohn*¹ warnings to a corporate

¹ 449 U.S. 383 (1981). The *Upjohn* case addressed the attorney-client privilege as to communications between corporate counsel and corporate employees, officers and directors. Since *Upjohn*, corporate counsel interviewing employees traditionally give "Upjohn" warnings: corporate counsel represents the company not the individual; that anything the employee tells corporate counsel is privileged, but that this privilege is the company's, not that of the witness; and, that the employee has no control over the disclosure of the employee's statements to third parties.

employee and discloses that employee's communications runs a grave risk of bar discipline.

A corporate employee, even though arguably represented individually by corporate counsel, may not prevent disclosure of the corporate employee's communications with corporate counsel except to the extent the corporate employee can demonstrate a personal privilege as to a specific communication.² However, the corporate attorney who makes such a disclosure runs a significant risk of bar disciplinary action.

William Ruehle was the former chief financial officer (CFO) of Broadcom Inc. During Ruehle's tenure as Broadcom's CFO, Broadcom hired its long-time corporate law firm, Irell & Manati (Irell), to perform an internal investigation (referred to as an Equity Review) into Broadcom's employee stock-option backdating practices.³ Ruehle was intimately involved in decisions regarding the Equity Review, and knew from the Equity Review's inception that Irell would disclose its results to independent outside auditor Ernst & Young.

The Irell law firm had represented Broadcom from the time of Broadcom's initial public offering. During the years Irell had represented Broadcom, Irell had also represented Ruehle (and other Broadcom employees) individually in matters unrelated to the Equity Review. In addition to these unrelated individual representations, Irell also represented Broadcom, as well as Ruehle individually, in certain civil lawsuits arising from Broadcom's option-granting practices.

During the time Irell was representing Ruehle in his individual capacity in these civil lawsuits, Irell also interviewed Ruehle as part of its Equity Review to discuss Broadcom's stock option practices and Ruehle's role as the company's CFO. During this interview, the topic of the civil securities lawsuits as they might relate to Ruehle personally never came up. Likewise, Ruehle never indicated he was seeking legal advice in his individual capacity during this interview. Sometime

² *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

³ "Backdating" refers to the practice of recording an option's grant date and strike price retrospectively. *Id.* at n.1.

after this interview, Irell advised Ruehle to obtain separate counsel. The district court doubted Ruehle ever received *Upjohn* warnings.⁴

The Equity Review revealed problems with the timing of the option grants and, as Ruehle knew it would, Irell disclosed those problems to the outside independent auditor. Irell's disclosure necessarily included the substance of Ruehle's interview with Irell during the Equity Review. Ultimately, a federal grand jury indicted Reuhle (and others) for various violations arising from Broadcom's options-dating practices.

During criminal discovery, Ruehle learned that, with company permission, Irell counsel had disclosed the substance of Ruehle's interview to the government in interviews by government agents during the government investigation. Ruehle moved to prevent the government's use of that interview in his criminal trial, arguing that his interview had constituted confidential communications made in the course of an attorney-client relationship. Granting Ruehle's suppression motion, the district court had found "no serious question . . . that when Mr. Ruehle met with the Irell lawyers . . . , Mr. Reuhle reasonably believed that an attorney-client relationship existed, he was communicating with his attorneys in the context of this relationship for the purpose of obtaining legal advice, and that any information he provided to Irell would remain confidential."⁵

On interlocutory appeal, the Ninth Circuit reversed the district court. The Ninth Circuit found no clear error in the district court's finding of an attorney-client privilege between Ruehle and Irell during the relevant interview. However, the Ninth Circuit reversed the district court's application of California law to prevent the government's use of that interview at Ruehle's criminal trial.⁶ Instead, the Ninth Circuit determined that the district court should have applied federal

⁴ Irell lawyers testified to having given Reuhle *Upjohn* warnings. Ruehle testified to not recalling *Upjohn* warnings. Irell attorneys neither documented nor made contemporaneous notes of having given such warnings. The district court disbelieved the Irell lawyers. The Ninth Circuit found no clear error.

⁵ *United States v. Nicholas*, No. SACR 08-00139-CJC, Slip op at 2,3 (C.D. Cal., April 1, 2009).

⁶ The California Evidence Code § 917, which the district court had applied to prevent the government's use of Ruehle's interview at trial, states that all "communication made in the course of an attorney-client relationship are presumed confidential."

common law of attorney-client privilege, which placed the burden on Ruehle to prove the existence of an attorney-client privilege, and would have required Ruehle to satisfy the “well established” eight-part test for assessing whether any given communication is covered by the attorney-client privilege.⁷ The fourth element of the eight-part test required a communication to have been made in confidence. Ruehle knew Irell would disclose his statements to the outside auditors. That knowledge meant that his interview was not made in confidence, and therefore it was not privileged. To the extent there were confidential communications between Ruehle and Irell in the interview, Ruehle had altogether failed to articulate them such as to permit the court to assess their confidentiality. “Ruehle was obliged to distinguish which particular statements should be afforded the privilege.”⁸ Irrespective of the attorney-client relationship Ruehle and Irell enjoyed, Ruehle could claim no blanket privilege as to those communications.

One other aspect of *Ruehle* bears serious consideration for the practitioner. In its opinion, the district court determined that it “[c]ould] not over look Irell’s ethical misconduct . . . and must refer Irell to the State Bar for appropriate discipline.”⁹ Even though the Irell lawyers testified to having given Ruehle *Upjohn* warnings, the district court “ha[d] serious doubts whether any *Upjohn* warning was given.”¹⁰ Moreover, Irell had failed to obtain Ruehle’s informed written consent to his simultaneous representation with Broadcom. Further, Irell had “breached its duty

⁷ “(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 is waived.” *Ruehle*, 583 F.3d at 607 The government had urged the court, rather than applying the more generalized eight part test for attorney-client privileged communications, to apply a specialized test for circumstances where there might be a joint representation of a corporation and its individual employees, officers, or directors. The Ninth Circuit declined to adopt a specialized test given Irell’s longstanding representation of Ruehle as an individual, and in light of the planned disclosure to the independent auditor. The case could, thus, be resolved using the traditional eight part test without the Ninth Circuit having to decide whether a more specialized test was required. The Ninth Circuit resolved this question in *United States v. Graf*, 20110 W.L. 2671813 (9th Cir., July 7, 2010), which adopted the specialized test set forth in *Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3rd Cir. 1986). The *Graf* case is discussed below.

⁸ *Id.* at 612.

⁹ No. 08-00139 Slip op at 3.

¹⁰ Slip op at 11.

of loyalty to Mr. Ruehle, a current client, by interrogating him for the benefit of . . . Broadcom.”¹¹ Finally, Irell had “disclosed Mr. Ruehle’s privileged communications to third parties without his consent.”¹² The district court (naming the individual lawyers by name in the opinion) found Irell’s breaches “very troubling [and noted that] . . . it must be disconcerting to Mr. Ruehle to know that his own lawyers at Irell disclosed his confidential and privileged information to the government, lawyers whom Mr. Ruehle trusted and believed would never do anything to hurt him.”¹³ Although the Ninth Circuit reversed the district court’s suppression order, the Ninth Circuit did not disturb the district court’s referral of the Irell attorneys to the California Bar.

The Specialized Standard: In the First, Third, Tenth, and possibly Second Circuits, intra-corporate communications between corporate employees and corporate counsel must meet a specialized standard.¹⁴

In *Ruehle*, the government had urged the Ninth Circuit to adopt a test, more stringent and specialized than *Ruehle*’s articulated eight-part test, to be applied where corporate employees assert the confidentiality of their communications with corporate counsel. The Ninth Circuit had declined to adopt that test in *Ruehle* because, on the facts in *Ruehle*, it had not needed to do so. *Ruehle* could not even satisfy the Ninth Circuit’s less stringent eight-part test because *Ruehle* had known his communications with Irell were not confidential. A little less than a year after deciding *Ruehle*, however, the Ninth Circuit adopted a more stringent standard to be applied to corporate attorney communications with corporate employees.

James Graf was the founder of Employer’s Mutual LLC, a Nevada corporation that purported to provide healthcare benefits coverage to its members.¹⁵ In

¹¹ Slip op at 14.

¹² Slip op at 17.

¹³ Slip op at 18.

¹⁴ *United States v. Graf*, 2010 W.L. 2671813 (9th Cir., July 7, 2010). *In re Grand Jury Subpoena (Newparent)*, 274 F.3d 563, 571-72 (1st Cir. 2001); *In re Grand Jury Subpoenas (Roe and Doe)*, 144 F.3d 653, 659 (10th Cir. 1998); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1040-41 (10th Cir. 1998); *United States v. Int’l Bhd of Teamsters*, 119 F.3d 210, 214-215 (2nd Cir. 1997) (citing the special test with approval but not expressly adopting it); *Ross v. City of Memphis*, 423 F.3d 596, 605 (6th Cir. 2005) (implying that it will apply this test).

¹⁵ *United States v. Graf*, 2010 W.L. 2671813 (9th Cir., July 7, 2010).

reality, the company was “part of an elaborate scheme to defraud the individuals and small businesses who purchased Employer’s Mutual health insurance plans.”¹⁶ Graf “was heavily involved in all facets of the corporation’s operations.”¹⁷ Eventually, a federal grand jury indicted Graf, who sought to exclude the testimony of attorneys who had represented Employer’s Mutual over the years. Graf was convicted and appealed his conviction, challenging, among other things, the district court’s admission of Graf’s communications with corporate counsel.

Affirming Graf’s conviction, the Ninth Circuit noted that Graf had offered no proof that corporate counsel had ever represented Graf individually. The Ninth Circuit then took the occasion to adopt the more stringent standard it did not reach in *Ruehle*. This standard is to be applied in cases where corporate employees claim privilege as to their communications with corporate counsel. Adopting the Eighth Circuit’s test,¹⁸ the new, more stringent Ninth Circuit test requires that corporate employees seeking to protect their communications with corporate counsel must demonstrate: (1) an approach to corporate counsel for the purpose of seeking legal advice; (2) the approach made it clear that the individual sought personal legal advice; (3) that corporate counsel saw fit to communicate with that corporate employee in the employee’s individual capacity knowing that a possible conflict could arise; (4) that the communication was confidential; and (5) that the substance of the communication did not concern matters within the company or the general affairs of the company.

The most striking part of this test is that, in addition to requiring confidentiality and mutual assent to the representation, it absolutely bars a corporate employee, even one like *Ruehle* who had a personal attorney-client privilege with corporate counsel, from preventing disclosure of communications with corporate counsel if those communications concern matters of interest to the corporation. This

¹⁶ *Id.*, slip op. at 1

¹⁷ *Id.*

¹⁸ *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3rd Cir. 1986).

appears to be so *even if both the corporate employee and the corporate attorney mutually assented to the representation and assured confidentiality.*

In circuits that have not yet adopted a specialized test, a corporate employee seeking to assert attorney-client confidentiality over communications with corporate counsel must demonstrate that the corporate employee’s belief in confidentiality was objectively reasonable.¹⁹

In *Wakeford*, AOL had engaged an outside corporate law firm to conduct an internal investigation into AOL’s relationship with PurchasePro Inc. The investigating attorneys interviewed Kent Wakeford, the manager of AOL’s business affairs division, on six occasions. At the third interview, AOL’s general counsel informed Wakeford as follows: “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 belongs to the company.”²⁰ Memoranda from that meeting also suggest that counsel for AOL told Wakeford that “they ‘*could*’ represent Wakeford as well, ‘as long as no conflict appear[ed].’”²¹ Company counsel also advised Wakeford that he could have personal counsel at the company’s expense if he so desired.²²

Eventually, a federal grand jury subpoenaed AOL for its memoranda of interviews with Wakeford. Wakeford moved to quash that subpoena, asserting an individual attorney-client privilege between himself and AOL counsel. Denying Wakeford’s motion to quash the subpoena, the district court ruled that the subpoenaed documents were not protected by the attorney-client privilege

¹⁹ *In re Grand Jury Subpoena (Wakeford)*, 415 F.3d 333, 340 n.6 (4th Cir. 2005) (declining to decide whether the specialized test should be adopted); *Int’l Bhd of Teamsters*, 119 F.3d at 214-215 (citing the test with approval, but not expressly adopting it.); *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985) (not addressing the more stringent test).

²⁰ *Id.*

²¹ *Id.* (emphasis supplied).

²² *Id.* In addition to *Wakeford*, AOL attorneys also interviewed other AOL employees as well. One of those witnesses asked investigating counsel whether he needed personal counsel, in response to which investigating counsel responded that he “did not recommend it.”*Id.* No matter; despite this, the result was the same—the employee could not prevent disclosure.

because Wakeford had failed to prove he was the investigating law firm's client when he gave his interviews.²³

The Fourth Circuit agreed that the documents should be produced, articulating "the classic test"²⁴ for determining whether the attorney-client privilege applies to any particular communication with a lawyer.²⁵ Wakeford's asserted privilege failed the "classic test" because, irrespective of his subjective belief that the law firm represented him, such a belief was not objectively reasonable given that "the investigating attorneys' statements to Wakeford, read in their entirety, demonstrated that the attorneys' loyalty was to the company. That loyalty was never implicitly or explicitly divided."²⁶

After rejecting Wakeford's claim, however, the Fourth Circuit addressed the conduct of investigating counsel. The court warned that its opinion "should not be read as an implicit acceptance of the watered down *Upjohn* warnings."²⁷ Rather, the provision of adequate *Upjohn* warnings served the investigating lawyers' need to avoid the "potential legal and ethical minefield"²⁸ that watered-down *Upjohn* warnings present. This minefield included potential ethics referrals or even disqualification of counsel.

²³ *Id.* The district court had relied on the specialized test, however the Fourth Circuit determined that on these facts, it did not need to determine whether a more specialized test was required.

²⁴ *Id.* at 339.

²⁵ The privilege only applies only if: (1) the asserted holder of the privilege is (or sought to be) a client; (2) the communication was made to a member of a bar or a subordinate and, in connection with the communication, is acting as a lawyer; (3) the communication relates to a fact the attorney learned from the client, outside the presence of strangers, for the purpose of securing either an opinion on law, legal services, or assistance in some legal proceeding (but not for purposes of committing a crime or tort); and (4) the privilege has been claimed and not waived by the client.

²⁶ *Id.* at 339 (Citing *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985) ("We think no individual attorney-client relationship can be inferred without some finding that the potential client's subjective belief is minimally reasonable."); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997) ("[W]e know of no authority . . . holding that a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one.") .

²⁷ *Id.* at 340.

²⁸ *Id.* at 340.

Irrespective of which test is applied, a corporate employee seeking to assert a privilege over communications with corporate counsel must specifically articulate the communications the employee asserts are privileged.²⁹

In 1996, Ron Carey won his re-election bid for the office of president of the International Brotherhood of Teamsters.³⁰ Carey's opponent, James Hoffa Jr., protested, alleging that the Carey Campaign had engaged in impermissible fundraising activity. The United States District Court for the Southern District of New York appointed an Election Officer (EO) and empowered the EO to investigate the allegations. The Carey Campaign authorized Cohen Weiss & Simon (CW&S), its counsel throughout the election, to perform an internal investigation and provide the EO with all necessary information.

During its internal investigation, CW&S discussed the Hoffa protest with Nash.³¹ CW&S attorneys told Nash that the conversations were "privileged," that CW&S would share his information with Carey, and cautioned Nash not to disclose the substance of the meeting to individuals outside of the Carey Campaign. However, CW&S never explicitly told Nash that the privilege was only with the Carey Campaign, not to Nash individually.³²

When an EO representative asked to interview Nash, CW&S attorneys recommended that Nash retain personal counsel. Nash told CW&S he believed the law firm was his personal counsel. CW&S disabused him of this belief. Although the Carey Campaign had waived its attorney-client privilege and ordered CW&S to disclose its discussions with Nash, CW&S declined to disclose its conversations with Nash without a court order. The district court ordered disclosure.

²⁹ *United States v. Int'l Bhd of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997); *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3rd Cir 1986); *In re Grand Jury Subpoena (Newparent)*, 274 F.3d 563, 571-572 (1st Cir. 2001) (an executive can control assertion of attorney-client privilege only as to matters segregable from those of concern to the corporation.) *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

³⁰ *United States v. Int'l Bhd of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997).

³¹ *Id.* CW&S had met with Nash regularly throughout the campaign, again, well before Hoffa ever made his allegations.

³² *Id.* at 213. Nash never sought personal legal advice from CW&S, nor did CW&S proffer any.

The Second Circuit determined that irrespective of Nash’s subjective belief that CW&S personally represented him— however reasonable that belief—Nash could not prevent disclosure of his communications with CW&S because Nash had failed to carry his burden of showing that he had either sought or received personal legal advice from CW&S.³³ Without that, the eight-part inquiry was not even triggered.³⁴

As had the Ninth and Fourth Circuits, though, the Second Circuit also questioned the conduct of the attorneys conducting the investigations. “We are mindful,” the court observed, “that the attorneys from CW&S did not do all that they could have done to clarify the conflicts of interest that can and do develop between organizations and their employees, or to clarify that CW&S represented the Campaign alone.”³⁵ Attorneys from CW&S had “violated the spirit, if not the letter, of the New York Code of Professional Responsibility, by failing to clarify that they did not represent Nash until five days after [CW&S] had consulted with [CW&S’s] own outside counsel on the matter, and one day after [CW&S] had received Nash’s consent to disclose the conversations to Carey.”³⁶ “Attorneys in all cases are required to clarify exactly whom they represent, and to highlight potential conflicts of interest to all concerned as early as possible.”³⁷ The Second Circuit noted that the district court could have imposed sanctions under the New York Code of Professional Responsibility, which specifically requires attorneys representing a corporation to tell employees exactly who they represent anytime it appears that the corporation’s interest might diverge from those of the employees, but had not made a referral because the district court had

³³ The Second Circuit applied essentially the same test applied by the Ninth Circuit in *Ruehle*. “(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at [the client’s] instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.” *Id.*

³⁴ Because of this, the Second Circuit did not need to address the district court’s ruling that Nash’s agreement to permit disclosure of his communications with counsel to his employer meant that Nash could not establish the existence of an attorney-client privilege for failure to meet the confidentiality prong of the Second Circuit’s eight-part test for the existence of an attorney client privilege.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

determined that the CW&S attorneys had met the ethics rules' minimum standards.

Conclusion

The General Rule

Corporate employees who seek to prevent disclosure of their communications with corporate counsel must specifically articulate the communications for which they seek to assert the privilege. Assuming the corporate employee makes this threshold showing, some circuits require the corporate employee to demonstrate an objectively reasonable belief that communications with corporate counsel would remain confidential. In other circuits, an employee cannot prevail on an assertion of privilege as to communications with corporate counsel where those communications concern matters within the company or the general affairs of the company. Where necessary, lawyers who represent corporate officers, directors, or employees should advise their clients to assume that no attorney-client privilege attaches to any communications with corporate counsel.

Provide Good Warnings

Attorneys must provide corporate employees with adequate *Upjohn* warnings or risk referral to state bar authorities. Of course, there are other risks as well. It is certainly possible, irrespective whether the attorney is disciplined, that an improper internal investigation could jeopardize the investigation's viability or result in the disqualification of the attorney or the firm. Moreover, the fact that an interviewing attorney does not create an attorney-client privilege with a corporate witness does not preclude the possibility that a court might nonetheless prevent the investigating law firm from continuing to represent the corporate client in matters adverse to the employee who was improperly warned.

Use a Written Script

Counsel should use a written script and read it to corporate employees before they are interviewed to ensure the warnings are given precisely the same way

every time. The less sophisticated the interviewee, the more safeguards the investigating attorney should build into this process.

Document the Warnings

Attorneys should document *Upjohn* warnings in a manner that will leave no doubt that they were given in a future court hearing.³⁸ In some cases, counsel might even consider requiring interviewed witnesses to acknowledge the warnings in writing. Such a process does, of course, risk chilling a witness' willingness to cooperate. For witnesses without criminal liability, this procedure is likely overkill and may even be perceived as less-than-adequate representation given counsel's duty to obtain information for the client. It is poor practice to scare a corporate employee, who has a duty to cooperate with the employer, into not cooperating.

Additional Considerations Where the Witness has Criminal Liability

There are cases where investigating counsel has a reasonable belief that an employee witness has criminal liability. In this situation, lawyers disagree over whether more should be given than just the basic warnings. On one view, the employee has a duty to cooperate with the employer. Corporate counsel has a duty to obtain information and not chill discussion. So long as adequate *Upjohn* warnings are given (with perhaps the additional warning that the interview is likely to be provided to the government), this is enough. The other view is that interviewing counsel should ask the employee, affirmatively, whether that employee wants counsel. At minimum, counsel must provide extremely well-documented *Upjohn* warnings in such circumstances, and might even consider obtaining the employee's written confirmation of having received these warnings, though, again, this is debatable. In all events, such interviews should probably

³⁸ See *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* (October 5, 2009), published by the ABA WCCC Working Group; YURI MIKULKA, LAWUPDATES.COM, *U.S. v. RUEHLE AND ATTORNEY-CLIENT PRIVILEGE: AN EXECUTIVE'S STATEMENTS TO OUTSIDE COUNSEL DURING INTERNAL INVESTIGATION NOT PRIVILEGED* (2009), www.lawupdates.com/tips/entry/iu.s._v._ruehle_i_and_attorney-client_privilege_an_executives_statements_to/; Lee Stein and Elizabeth Krshek, *The Importance of Robust Upjohn Warnings after Ruehle*, The American Bar Association: Criminal Justice Section Newsletter, Winter 2010, at 1.

never be conducted without a witness present to document that good warnings were given.

The critical thing to remember here is that the district court in *Ruehle* disbelieved the lawyers who testified they had given *Upjohn* warnings, and the Ninth Circuit did not disturb that finding. No lawyer wants to be named in a written opinion that makes such a finding.

Be Attuned to Conflicts

Throughout any investigation, on an ongoing basis, attorneys must objectively assess whether and where potential conflicts of interest might arise. At the point where it seems as though a conflict might exist, counsel must make sure, if not already done, to perfect the *Upjohn* warnings and resolve the conflict.

Corporate counsel must prepare for that moment where the witness asks questions or makes comments that suggest the witness believes corporate counsel is the employee's personal lawyer. Questions such as: "Am I in trouble?"; "What is my liability here?"; or "Do you think I need a lawyer?" create a risk for counsel who is not prepared to deal with these red flag questions. With regard to the first two questions, and others like them, of course, counsel must tell the employee that counsel cannot answer the questions because counsel does not represent the employee. As to the third, counsel's response should be that counsel cannot advise the employee but that the employee is free to seek counsel if so desired. Of course, to the extent corporate counsel is considering it, counsel should be aware that it is always dangerous to represent both the company and any of its employees.

Disclosure in the Presence of Bad Upjohn Warnings

Finally, what should counsel do if the company directs disclosure of witness statements in cases where adequate *Upjohn* warnings were not given, particularly where that disclosure would criminally implicate an interviewed witness? In that case, counsel should consider informing the employee that the witness' statements will be disclosed, then give the employee time to take the

appropriate action before disclosure. This will of course be messy and, ultimately, would have been avoidable with proper *Upjohn* warnings in the first instance.

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