Preserving the Attorney-Client Privilege in Internal Corporate Investigations
Part II

By

J. Richard Kiefer and Casey C. Kannenberg
Bingham McHale LLP
Indianapolis, Indiana

Part I of this Article examined several factual contexts in which concerns regarding the preservation of the attorney-client privilege may arise in the course of an internal corporate investigation. Specifically, Part I discussed the Ninth Circuit's opinion in *United States v. Ruehle*, in which the court held that neither the attorneys' failure to provide the corporate constituent adequate *Upjohn* warnings nor the existence of an attorney-client relationship between the attorneys and the corporate constituent were enough to overcome the salient fact that the relevant communications were not privileged.[1] In addition, Part I discussed the applicable Indiana Rules of Professional Conduct that govern attorney conduct in the course of conducting an internal corporate investigation. Rule 1.13(f), for example, requires Indiana attorneys to explain the identity of the client—the corporation—when the attorneys know or reasonably should know that the corporation may have adverse interests to the corporate constituent with whom the attorneys are dealing.[2] Rule 4.3, on the other hand, imposes an obligation upon Indiana attorneys to clarify their roles when they know or reasonably should know that an unrepresented individual "misunderstands" the attorney's role.[3]

With the foundation thus laid, Part II examines the ABA White Collar Crime Committee's *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* (the "*Upjohn* Report")[4] and its recommendations for attorneys who find themselves ensnared in the ethical morass of an internal corporate investigation. What, if anything, should Indiana attorneys say to corporate constituents in the course of conducting an internal corporate investigation where the interests of the corporation and corporate constituents may be adverse? Last, Part II discusses the concerns associated with third-party disclosure and the doctrine of limited waiver.

I. THE *UPJOHN* TASK FORCE REPORT

While *Ruehle* may have created some confusion concerning the future viability and necessity of *Upjohn* warnings, the *Upjohn* Task Force Report, issued on July 17, 2009, indicates that the warnings remain a vital tool for "making it clear to Constituents that the corporation, and the corporation alone, is the holder of the privilege."[5] Indeed, "in the absence of such warnings, Constituents may be able to assert that they, too, hold the privilege."[6] Accordingly, the *Upjohn* Report sets forth recommended "best practices" to guide corporate counsel. These practices are not intended to "impose additional burdens on corporate counsel, but to make sure that investigations are conducted in a way that abides by the operative principles, and simultaneously protects the attorney-client privilege between counsel and the corporation."[7] This section will discuss the recommendations and analyze them in the context of the Model Rules and *Ruehle*.

The recommendations in the *Upjohn* Report begin with a suggested wording of the *Upjohn* warning:

> I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.
>
> I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.
>
> Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, without notifying you.
>
> In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss *this* discussion.
>
> Do you have any questions?
>
> Are you willing to proceed?[8]

The Report then proceeds with a number of specific recommendations to follow when administering the warnings. The first recommendation is to provide the warnings prior to conducting the interview.[9] The next is to *orally* provide the warnings, following a written "script" to ensure that the warnings are given in the same manner each time.[10] Last, counsel should keep a *written record* that the warnings were read to the constituent.[11] This may help avoid the situation in *Ruehle*, where the court found that no warning was provided because of the lack of a record of it.

The *Upjohn* Report then addresses other factors that may be relevant to corporate counsels' investigative strategy, recognizing that each investigation brings with it a unique set of factual circumstances. One such factor is whether a corporate constituent approaches counsel independently to, for example, self-report misconduct or report misconduct by other constituents.[12] If such reporting raises the possibility of a conflict, then best practices dictate that counsel must notify the constituent that the entity is the client, and should also provide *Upjohn* warnings.[13] Model Rule 1.13(f) would also be triggered in this instance, requiring the attorney to disclose the identity of the client.[14]

The Report also suggests that counsel should consider supplementing the oral *Upjohn* warnings with written warnings, and might even require the corporate constituent to sign a written acknowledgment.[15] The obvious benefit to this approach would be eliminating any risk that the constituent will be able to later challenge whether the warnings were given, as happened in *Ruehle*. On

the other hand, there is no denying the "chilling effect on the Constituent's willingness to share information" that would occur if she were required to sign an acknowledgment.[16] Indeed, the possibility of a chilling effect has lead many attorneys to give so–called "watered-down warnings in an effort to extract full information from employees."[17] In any event, written *Upjohn* warnings are not required by the ethical rules, so each attorney must balance the aforementioned competing interests and decide if such a course of action is prudent given the facts presented.

Another factor that may be present is that a corporate constituent may ask, in the course of an interview, whether she needs a lawyer. The *Upjohn* Report recommends that attorneys inform the constituent that she has the right to have counsel present, or should simply advise her of this right as part of the *Upjohn* warnings.[18] Additionally, a corporate constituent may inquire into the consequences of refusing to cooperate in the investigation. In this circumstance, counsel should inform the constituent of the relevant corporate policy regarding internal investigations, including—if necessary—the fact that they may face discipline by refusing to cooperate.[19]

The most significant factor, perhaps, that can influence a corporate attorney's investigative strategy arises in the context of dual representation of the corporate entity and corporate constituents. Dual representation "may be ethically possible when the facts show the absence of a conflict of interest between the corporation and the Constituent."[20] If no conflict of interest exists, then the corporate entity can "consent[] to having its corporate counsel represent both the corporation and the Constituent . . . ."[21] When the situation changes, and it becomes evident that a conflict exists—or soon will exist—the *Upjohn* Report states that counsel "must withdraw from representing one of both parties."[22] A greater problem exists when, as in *Ruehle*, the entity wishes to waive the attorney-client privilege and the constituent does not. The Report addresses this issue by observing that a corporation may seek advance approval from the constituent that the entity can waive the attorney-client privilege.[23]

The main criticism of the *Upjohn* Report's best practice recommendations is that they may have the ancillary effect of placing a heightened and undue burden on corporate counsel, and may lead to corporate constituents being much less willing to speak candidly in the course of an investigatory interview. It is not hard to imagine how intimidated a constituent might feel after listening to a drawn-out *Upjohn* soliloquy, followed by a written acknowledgment, and then capped off with the threat of being fired or disciplined if she does not cooperate. Fortunately, attorneys will be able to exercise a certain degree of autonomy in selecting how far to go with the warnings. For instance, an attorney may choose not to require the constituent to sign a written acknowledgment, and may omit from the warnings that the constituent has the right to have counsel present. Obviously, there are certain non-negotiable elements of the interview process. For example, Model Rule 1.13(f) requires counsel to disclose the identity of the client if she knows, or reasonably should know, that there is a conflict. In short, attorneys may utilize the *Upjohn* Report's best practices to the extent that the unique facts of the situation dictate.

II. Disclosure to Third Parties and the Doctrine of Limited Waiver

One final ethical dilemma that corporate counsel face in the context of internal corporate investigations is the possibility of inadvertently waiving the attorney-client privilege by making disclosures to third parties, such as the Government or outside audit committees. The issue in these circumstances is whether the attorney has completely waived the privilege, or merely selectively waived it. Under the limited waiver doctrine, "disclosures of privileged information to government agencies

would not waive the privileges."[24] The implication of selective waiver is quite significant to corporate entities, which often face civil liability via shareholder derivative actions in addition to potential criminal liability. For instance, counsel may disclose a limited amount of privileged material in the course of a presentation to a government agency in an effort to avoid indictment, only to have shareholders file suit and seek to have the materials turned over due to waiver of the attorney-client privilege.[25]

The circuit courts are currently split on this issue of limited waiver, although the split is more accurately characterized as a three-way split. The First category finds that limited waiver is permissible. The Second category holds that limited waiver is never permissible. The final category finds that limited waiver is permissible *only* where the parties have agreed in advance that the privileged material will remain confidential after the limited disclosure.[26] The Eighth Circuit arguably stands alone in the First category. In *Diversified,* the corporation voluntarily surrendered privileged material to the SEC pursuant to a subpoena.[27] A shareholder sought to obtain a copy of the audit report, asserting that the attorney-client privilege was waived.[28] The Eighth Circuit disagreed, concluding that "only a limited waiver of the privilege occurred."[29] As a justification for not waiving the privilege entirely, the court noted that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders potential stockholders, and customers."[30] Several district courts have sided with the Eighth Circuit and applied the doctrine of limited waiver.[31]

A majority of the circuit courts disagree with the Eighth Circuit and have held that there is no limited waiver. In this category are the D.C.,[32] Federal,[33] First,[34] Third,[35] Fourth,[36] and possibly the Second[37] Circuits. In *Westinghouse,* for example, Westinghouse made certain privileged documents available to the SEC and the DOJ.[38] During discovery Republic requested Westinghouse to produce the documents that it had turned over to the DOJ and SEC.[39] Westinghouse objected, claiming that the documents were protected by the attorney-client privilege and the work product doctrine.[40] The Third Circuit rejected the idea that Westinghouse had selectively waived the privilege, observing that "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purposes."[41] In *MIT*, the Fourth Circuit also rejected the idea of selective waiver, stating that "anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage."[42] In short, the circuit courts that reject the limited waiver doctrine have very little sympathy for those who produce privileged materials to gain cooperation credit.

The final category, those that may permit a species of the limited disclosure doctrine, provided that the parties agree in advance to keep the materials confidential, may include the Second[43] and Seventh[44] circuits. In *Steinhardt,* the corporate counsel prepared a memorandum for the SEC in response to an inquiry during an investigation.[45] While the attorney wrote "FOIA Confidential Treatment Requested," there was no agreement between counsel and the SEC that the SEC would preserve the confidentiality of the materials.[46] Subsequently, civil suits were filed against the company, and the plaintiffs requested the documents produced to the SEC.[47] Although the Second Circuit declined to apply limited waiver to these facts, it nonetheless "decline[d] to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection."[48] Decisions concerning limited waiver "must be done on a case-by-case basis."[49] The court observed that "a rigid rule would fail to anticipate

situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have *entered into an explicit agreement* that the SEC will maintain . . . confidentiality . . . ."[50] In *In re Leslie Fay Co., Inc. Securities Litigation*, the Southern District of New York cited *Steinhardt* and held that the confidentiality agreements at issue "satisfy the standard articulated in *Steinhardt*."[51]

In a Seventh Circuit case, plaintiffs in a civil suit sought to obtain materials from the government's criminal investigation of Archer Daniels Midland ("ADM").[52] Specifically, the plaintiffs subpoenaed video and audio tapes made by the FBI in its investigation of ADM that were shared with the law firm representing ADM's outside directors.[53] They claimed that by allowing the lawyers to listen to the tapes and make notes, without first insisting on a protective order or that the lawyers sign a confidentiality agreement, the government waived its privilege.[54] The court first acknowledged that it was a mistake for the government to not first obtain a protective order or confidentiality agreement with the lawyers prior to sharing the materials.[55] The court then held, however, that the government should not be punished with waiver of the privilege because there was no indication that the government was acting in bad faith or that the plaintiffs were harmed.[56] In other words, in the Seventh Circuit, courts may find waiver of the privilege if the attorneys act in bad faith or there is harm to plaintiffs in withholding materials. In the absence of one of these two factors, the selective disclosure of documents or materials—even without a protective order or confidentiality agreement—may not lead to the waiver of the privilege.

The circuit split should serve more as a cautionary tale to corporate counsel, rather than a sign of hope that the limited waiver doctrine may fully blossom into fruition. It is a highly charged, highly unsettled area of the law. Look no further than the Seventh and Second Circuits, which are lodged somewhere between the second and third categories, for evidence of the doctrine's volatility. Indiana corporate counsel may find it best to avoid exposing privileged materials to third parties *unless* it is absolutely in the client's best interests, and the client gives informed consent (perhaps in writing) to the disclosure.

III. CONCLUSION

While internal corporate investigations seem to present a land mine of ethical dilemmas for corporate counsel, both *Ruehle* and the *Upjohn* Report have somewhat clarified the terrain. *Ruehle* suggests that if constituents can assert the existence of an attorney-client relationship *and* satisfy the heavy burden of showing that a particular communication satisfies the federal privilege test, then the corporate constituent may assert the privilege. Perhaps the case is a warning to corporate counsel to avoid finding themselves in the ethical quandary of having adverse clients, one asserting the privilege and the other attempting to waive it.

The *Upjohn* Report brings much-needed guidance to the investigatory interview process. By furnishing a "spectrum" of recommended practices to guide attorneys through the unique circumstances of corporate investigations, the Report may well reduce the need and incentive for corporate counsel to inadequately warn corporate constituents. The complement to the Report is, of course, the Rules of Professional Conduct. Model Rules 1.13 and 4.3 can be seen as the basis—or the *minimum*—that attorneys should meet as they conduct internal investigations. Perhaps the two words that best characterize the triggering of an obligation under the Rules are "conflict" and "confusion": if either is

present during an interview, the attorney likely needs to clarify an important fact—the identity of the client.

Finally, corporate counsel need to be exceedingly cautious when dealing with third parties and privileged materials. While a "select few" courts affirmatively allow limited waiver of privileged information, the safer—and most ethical—course is to vigilantly guard such information, unless the corporate entity wishes to waive the privilege. The failure to protect privileged material could lead to complete waiver, and subsequent civil liability exposure.

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[1] *United States v. Ruehle*, 583 F.3d 600, 613 (2009).
[2] INDIANA RULES OF PROF'L CONDUCT R. 1.13(f) (2010).
[3] *Id*. R. 4.3.
[4] AM. BAR ASS'N WHITE COLLAR CRIME COMM., UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES (July 17, 2009) [hereinafter Upjohn Report], *available at* http://www.fr.com/news/2009/July/ABA_Upjohn_Task_Force.pdf.
[5] *Id*. at 2.
[6] *Id*. This statement conflicts with the Ninth Circuit's opinion in *Ruehle*, which seems to indicate that the absence of *Upjohn* warnings will not prohibit the entity from waiving the privilege. *See supra* text accompanying note **Error! Bookmark not defined.**.
[7] Upjohn Report, *supra* note 4, at 2.
[8] *Id*. at 3.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] Upjohn Report, *supra* note 4, at 5.
[13] *Id*.
[14] *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2010).
[15] Upjohn Report, *supra* note 4, at 5.
[16] *Id*. at 6.
[17] Lawton P. Cummings, *The Ethical Mine Field; Corporate Internal Investigations and Individual Assertions of th Attorney-Client Privilege*, 109 W. VA. L. REV. 669, 670 (2007)
[18] Upjohn Report, *supra* note 4, at 6.
[19] *Id*. at 7.
[20] *Id*. at 33.
[21] Upjohn Report, *supra* note 4, at 8.
[22] *Id*. at 34.
[23] *Id*.
[24] Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is Half-Privilege Worth Having at All?*, 30 SEATTLE UNIV. L. REV. 155, 165 (2006).
[25] *See, e.g.*, *Steinhardt v. Steinhardt*, 9 F.3d 230, 232 (2d Cir. 1993).
[26] Marks, *supra* note 24, at 170.
[27] *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).
[28] *Id*. at 596, 601.
[29] *Id*. at 611.
[30] *Id*.
[31] *See, e.g.*, *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (D. Wis. 1979); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 689 (S.D.N.Y. 1980).
[32] *See In re: Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984).
[33] *See Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409 (Fed. Cir. 1997).
[34] *See United States v. M.I.T.*, 129 F.3d 681 (1st Cir. 1997).
[35] *See Westinghouse Elec. Corp. v. The Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1992).
[36] *See Martin Marietta Corp. v. Pollard*, 856 F.2d 619 (4th Cir. 1988).

[37] *See In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982). Another case suggests that the Second Circuit belongs to the third category—those that may allow limited waiver if there is an express agreement. *See Steinhardt v. Steinhardt*, 9 F.3d 230 (2d Cir. 1993).
[38] *Westinghouse*, 951 F.2d at 1420.
[39] *Id*.
[40] *Id*.
[41] *Id*. at 1425.
[42] *M.I.T.*, 129 F.3d at 686.
[43] *See Steinhardt v. Steinhardt*, 9 F.3d 230 (2d Cir. 1993).
[44] *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997).
[45] *Steinhardt*, 9 F.3d at 232.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 236.
[49] *Id*.
[50] *Steinhardt*, 9 F.3d at 236.
[51] *In re Leslie Fay Co., Inc. Sec. Litig.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995).
[52] *Dellwood Farms v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997).
[53] *Id*. at 1124.
[54] *Id*.
[55] *Id*. at 1127.
[56] *Id*.