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

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I. INTRODUCTION

In the past decade, corporate counsel conducting internal corporate investigations have experienced increasing uncertainty with respect to ethical issues surrounding representation of the corporation—including counsel's relationship with the corporation's constituents[1]—and the attorney-client privilege. As an illustration of the dilemma, consider the following hypothetical. Imagine that "Attorney" has a very good friend—perhaps a sorority sister from college—with whom she has remained close over the years. Perhaps they play golf together every other weekend, and maybe their children go to the same school. Attorney has occasionally assisted her close friend with her legal affairs, perhaps drafting a will or providing advice regarding a business transaction. Imagine also that this friend is the CFO of an Indiana corporation. Attorney's law firm has just been retained by the friend's corporation to serve as outside counsel in the investigation of potential fraudulent accounting practices. The friend comes to Attorney—visibly shaken—and informs her that she is worried that the investigation may reveal potential wrongdoing on the part of various actors within the corporation. The corporation, however, has stated its intention to waive the attorney/client privilege in order to assist the SEC in a potential criminal investigation. Attorney represents the corporation, but finds herself conflicted because her good friend may be involved in the conduct at issue. Who does Attorney represent? What should she tell the friend? Are the friend's statements to Attorney protected by the attorney-client privilege?

The foregoing questions have not always been easy to answer. In the post-Enron era of government inquiry into corporate practices, in-house and outside counsel have struggled to ascertain the parameters of legal ethics in internal corporate investigations—most notably with respect to issues surrounding the attorney-client privilege. Indeed, the Department of Justice ("DOJ") policies[2] relating to whether corporations should be prosecuted in a case have focused on the corporation's willingness to cooperate by waiving the attorney client privilege, which has sparked a newfound willingness by some corporations to turn over privileged material—often at the expense of its constituents. While recent modifications to the DOJ policies[3] require written authorization to request waiver of the attorney-client privilege and prohibiting government investigators from demanding the release of privileged material, the remaining strong incentives for corporations to cooperate with federal investigators create a quagmire of ethical issues for

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corporate counsel.[4] When corporate counsel undertake internal corporate investigations, who do they represent: the entity client, the corporate constituents, or both? What can corporate counsel do to ensure that the attorney-client privilege is not waived when dealing with—and making representations to—third parties?

Two events that occurred in 2009 promise to provide much needed clarity for the issue of protecting the attorney-client privilege during the course of internal corporate investigations. The first was the Ninth Circuit's decision in *United States v. Ruehle*,[5] which overturned a California district court decision suppressing a Broadcom former CFO's statements regarding stock option granting practices. In overturning the decision, the Court concluded that neither the failure to give adequate *Upjohn* warnings—which take their name from a U.S. Supreme Court case and require attorneys to clarify their role as corporate counsel—nor the existence of an attorney-client relationship between the CFO and corporate counsel in a related civil lawsuit were sufficient to overcome the fact that the communications at issue were not privileged.[6]

The second event was the release of a report by the ABA White Collar Crime Committee's Upjohn Task Force entitled *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* (the "Upjohn Report").[7] The purpose of the Upjohn Report was to answer the question: "What best practices should corporate counsel follow when interacting with corporate employees while conducting internal investigations on behalf of the corporate entity?"[8] This two-part article will discuss and analyze *Ruehle* and the Upjohn Report, as well as the applicable ethical rules, and provide guidance on how in-house and outside counsel can best protect the attorney-client privilege during the course of internal corporate investigations. The first part will discuss the applicable Indiana Rules, while the second part will address the Upjohn Report and the issues of disclosure to third parties and the doctrine of limited waiver.

II. The Indiana Professional Conduct Rules and Representing Corporations

Before turning to *Ruehle* and the Upjohn Report, it is appropriate to examine the source that every Indiana attorney should first consult when faced with an ethical issue: the Indiana Rules of Professional Conduct ("RPC"). Two Rules in particular govern attorney conduct with respect to corporations and unrepresented individuals. The first is RPC 1.13,[9] which states: "A lawyer employed or retained by an organization *represents the organization* acting through its duly authorized constituents."[10] Comment [1] to the Rule clarifies that the corporate entity acts "through its officers, directors, employees, shareholders" and so-called "other constituents," which include equivalent persons acting for non-corporate organizational clients.[11] Essentially, RPC 1.13(a) serves as a default rule: whenever counsel is retained by the entity to represent the entity, the entity *alone* is the client.

RPC 1.13(g) details the exception. It provides that "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents . . . ."[12] As will be discussed *infra* Part III, dual representation presents special concerns for corporate counsel, especially when it becomes evident that there is a conflict between the entity and the constituent. In either case, RPC 1.13(f) makes clear that an attorney who is dealing with "an organization's directors, officers, employees, members, shareholders, or

other constituents . . . *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."[13] In such a situation, the attorney has an obligation to advise the constituent of the conflict, that the attorney cannot represent the constituent, and that they may seek independent counsel.[14] Note, however, that this heightened obligation does not apply *until* the attorney knows or should know that there is adversity of interest.[15] In other words, for example, the Rule does not require corporate counsel to explain the identity of the client in the early stages of an investigation when it is unclear whether a particular constituent's interests will ultimately be adverse to the entity.[16]

The second Rule, RPC 4.3,[17] "relates most directly to situations a lawyer is likely to encounter in the course of an internal corporate investigation": unrepresented corporate constituents.[18] The Rule provides that:

> 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.[19]

RPC 4.3 does not require that the parties be adverse to trigger an obligation—it merely requires that the constituent "misunderstands" the attorney's role.[20] Thus, RPC 1.13(f) applies when the attorney knows (or reasonably should know) that there is adversity, whereas RPC 4.3(a) applies when the attorney knows (or reasonably should know) that the constituent "misunderstands the lawyer's role."[21]

III. *UNITED STATES V. RUEHLE* AND THE ISSUE OF CORPORATE CONSTITUENTS ASSERTING THE ATTORNEY-CLIENT PRIVILEGE

One of the most difficult challenges corporate counsel face during investigations is the "inherent tension between zealous representation of their corporate clients and fairness to corporate constituents."[22] This tension is further exacerbated when corporate constituents believe—mistakenly or otherwise—that they are also the client of the corporate counsel. Such a belief can manifest itself in primarily three ways: (1) the corporate counsel has an existing relationship with a corporate constituent, through representation in past or present independent litigation (as in the hypothetical illustrated *supra* Part I); (2) the corporate entity hires the corporate counsel to represent both the entity *and* the corporate constituents; or (3) the conduct of the corporate counsel and corporate constituents creates in the constituents a subjective belief that they are the clients of the corporate counsel.[23]

If corporate constituents and the corporate counsel have in fact formed an attorney-client relationship, the issue then becomes whether the corporate constituents may assert the attorney-client privilege over the objection of the corporate entity. The circuits are currently split on this

issue,[24] although much of the debate may no longer be fertile in the wake of *United States v. Ruehle*. *Ruehle* overturned a California District Court decision suppressing certain communications made by a corporate CFO to corporate counsel.[25] The facts help illustrate some of the perils associated with representing both the entity and constituents.[26]

Starting in 2002, Irell & Manella LLP ("Irell") began representing Broadcom Corp. ("Broadcom") and William J. Ruehle ("Ruehle"), the company's CFO, in "several securities-related actions."[27] Irell warned Ruehle, in writing, of the potential for conflict in the dual representation, and received Ruehle's written consent to proceed.[28] In mid-2006, a series of newspaper stories were released that revealed the stock option back-dating practices at Broadcom.[29] Mindful of a looming government investigation or shareholder suit, Broadcom retained Irell to conduct a corporate investigation into the stock granting practices "on behalf of the corporation."[30] A group of shareholders filed a derivative action, naming Ruehle and others in the complaint, and Irell agreed to represent Ruehle in the shareholder litigation.[31] This time, however, Irell did not obtain Ruehle's informed consent to the dual representation.[32]

Over the course of a month, Irell communicated with Ruehle via email regarding the status of the shareholder litigation, and then interviewed him regarding the stock option granting practices—during which Irell did not inform Ruehle that they did not represent him in the internal investigation.[33] Irell never told Ruehle to seek independent counsel, and never disclosed to him that his statements would be revealed to third parties.[34] When the SEC began its formal investigation of Broadcom in June of 2006, Irell continued to render legal advice to Ruehle, and Ruehle continued to seek legal advice from Irell.[35]

In August of 2006, Irell disclosed Ruehle's statements to Broadcom's outside auditors, and then disclosed the same information to the SEC and U.S. Attorney's office.[36] Subsequently, the Government interviewed Irell attorneys regarding their interviews with Ruehle. Ruehle did not consent to any of the disclosures made by Irell.[37] Ruehle was subsequently indicted and learned that his statements had been disclosed to the Government, and that it intended to use the statements against him. Ruehle objected and filed a motion to suppress the statements, asserting that his statements to, and conversations with, Irell were protected by the attorney-client privilege.[38]

The district court first addressed the issue of whether Ruehle's communications to Irell were privileged. The court applied a three-pronged test, relying primarily on state law, in determining the nature of the communications: (1) whether the party formed an attorney-client relationship with counsel, (2) whether the communication was made in the course of obtaining legal advice, and (3) whether the communication was intended to be confidential.[39] Answering each prong in the affirmative and granting his motion to suppress, the court concluded that the statements were privileged attorney-client communications, allowing Ruehle to assert the privilege in the face of Broadcom's waiver.[40] As part of its analysis, the court addressed the Government's claim that Irell had given Ruehle *Upjohn* warnings, which:

> (1) inform the Constituent that the Constituent is not a client; (2) warn the Constituent that the corporation's counsel is not bound to keep the Constituent's information confidential; and (3) explain that the corporation alone, not the

> Constituent, may choose to reveal to outside parties what transpired during the interview between the Constituent and corporate counsel.[41]

The court found two flaws in the Government's argument. First, it had "serious doubts whether any *Upjohn* warning was given to [] Ruehle," given that Ruehle had no recollection of any such warning and there was no written record of the warning.[42] Second, the court found that "whether an *Upjohn* warning was or was not given [was] irrelevant in light of the undisputed attorney-client relationship between Irell and [] Ruehle."[43] In the court's view, the warning is "simply not sufficient to suspend or dissolve an existing attorney-client relationship and to waive the privilege."[44]

The court next rebuked Irell's conduct in the course of performing the internal investigation. The court found that Irell had breached its duty of loyalty to Irell in three ways: (1) by failing to obtain written consent to the dual representation; (2) by "interrogating him for the benefit of another client"; and (3) by disclosing privileged communications to third parties without his consent.[45] At the conclusion of its condemnation, the court referred Irell to the State Bar for disciplinary proceedings.[46]

The Ninth Circuit overturned the district court's decision with respect to the confidentiality of the statements. After first conceding that Irell had attorney-client relationships with both Broadcom and Ruehle, the court then observed that the party asserting the relationship has the additional burden of demonstrating the privileged nature of the communications in question.[47] Unlike the district court, the Ninth Circuit observed that actions at "federal law are governed by federal common law,"[48] and therefore the "strict view applied under federal common law" applies here.[49] Rather than the three-pronged test applied by the district court, the appellate court applied an eight-part federal test:

> (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 his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection be waived.[50]

Applying the above test, the court determined that Ruehle failed to meet prong 4: "Ruehle's statements to the Irell attorneys were not 'made in confidence' but rather for the purpose of disclosure to the outside auditors."[51] In reaching this conclusion, the court emphasized that Ruehle "was no ordinary Broadcom employee."[52] Indeed, Ruehle was aware from the outset of the investigation that the company fully intended to cooperate with the SEC and the outside auditors.[53] He even acknowledged at an evidentiary hearing that it was his understanding that factual information would be disclosed to third parties.[54] Ultimately, the court found that Ruehle failed to meet his burden that the communications made to Irell in 2006 were protected by the attorney-client privilege.[55]

IV. LESSONS FROM *RUEHLE*

Notwithstanding the fact-specific nature of the case, several broad principles emerge from the Ninth Circuit's opinion in *Ruehle* that may help guide Indiana attorneys acting as corporate counsel in the context of an internal investigation. First, when asked to represent both a corporation or other business entity and an employee, counsel should determine, as soon as possible, whether joint representation is permissible under the ethical rules and case law. The perilous nature of continuing such dual representation is evident in *Ruehle*. Counsel may find themselves caught between a rock and a hard place when their entity clients wish to waive the privilege in order to gain the favor of the Government, while their corporate constituent clients seek to assert the privilege to avoid criminal liability. Counsel should, as a minimum, discuss with the corporation and the employee the potential conflicts that may arise from joint representation, and, if document any waivers of conflicts in writing.

Second, counsel who represent corporate constituents in the course of an internal investigation must take heightened measures to clarify the attorney-client privilege. As *Ruehle* indicates, it may not be sufficient to have an attorney-client relationship: the communications at issue must also satisfy the strict eight-part common law test for privileged communications.[56] Accordingly, corporate counsel should communicate the client-entity's goals to the client-constituent. If the client-entity does not anticipate waiving the attorney-client privilege, then there may not be a problem. If the client-entity does intend to waive the privilege, the client-constituent should know that any communications that do not meet the eight-part privilege test (e.g., communications that are not made with the intent to seek legal advice, etc.), as well as the facts underlying the communications, may be divulged at the entity's behest.

Last, in the post-*Ruehle* world, *Upjohn* warnings may be less effective to protect the interests of corporate constituents. In *Ruehle*, the Ninth Circuit accepted the district court's finding that Ruehle had not received the warnings, yet found the failure to warn irrelevant to its analysis. Indeed, some commentators have suggested that federal courts will, in the post-*Ruehle* era, presume that "sophisticated senior officers or directors . . . understand the fundamental nature of an internal investigation and the likelihood that information collected during it will at some point be disclosed to third parties."[57] Most significantly, the decision "indicates that . . . [*Upjohn* warnings] are not a predicate to the admissibility or disclosure of statements in subsequent criminal proceedings regarding the subject matter of [the] investigation."[58] The lingering question is, of course, what of less sophisticated client-constitutes who do not receive—or receive less than adequate—warnings? *Ruehle* suggests that the client-entity may waive the privilege *unless* the client-constituent is able to claim both the existence of an attorney-client relationship and that the communications at issue are privileged.

Part II of this Article will examine two other factors Indiana attorneys must consider that bear on the attorney-client privilege in the context of internal corporate investigations: (1) the Upjohn Report and (2) issues regarding disclosure to third parties.

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[1] Consistent with the Indiana Rules of Professional Conduct and the relevant case law, this Article refers to "corporate constituents," a category which includes a corporation's officers, directors, employees, members, shareholders, and various other corporate actors. The term should not be confused with the "corporation" itself.

[2] Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to United States Attorneys (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm. The Thompson Memorandum set forth the factors to be considered in determining whether to charge a corporation. One of the factors is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection." *Id*.

[3] Memorandum from Paul J. McNulty, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to United States Attorneys (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf; THE DEPT. OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (Aug. 28, 2008), *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

[4] *See, e.g.*, Lawton P. Cummings, *The Ethical Mine Field; Corporate Internal Investigations and Individual Assertions of th Attorney-Client Privilege*, 109 W. VA. L. REV. 669, 669–70 (2007) (noting that "[t]he recent trend towards waiver of the privilege by corporations has exposed a troubling tactic practiced by attorneys conducting internal investigations").

[5] 583 F.3d 600 (2009).

[6] *Id*. at 613.

[7] 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. *Upjohn* warnings have their origin in the U.S. Supreme Court decision, *Upjohn v. United States*, 449 U.S. 383 (1981). Although a detailed recount of the *Upjohn* decision is beyond the scope of this Article, Part II of this Article discusses how corporate counsel can effectively give *Upjohn* warnings.

[8] *Id*. at 1.

[9] INDIANA RULES OF PROF'L CONDUCT R. 1.13 (2010).

[10] *Id*. R. 1.13(a) (emphasis added).

[11] *Id*. R. 1.13 cmt. [1].

[12] *Id*. R. 1.13(g).

[13] *Id*. R. 1.13(f).

[14] INDIANA RULES OF PROF'L CONDUCT R. 1.13 cmt. [10].

[15] *See, e.g.*, Timothy M. Middleton, *"Watered-Down Warnings": The Legal and Ethical Requirements of Corporate Attorneys in Providing Employees with "Upjohn Warnings" in Internal Investigations*, 21 GEO. J. LEGAL ETHICS 951, 958 (2008) (noting that "[e]ven following Comment 10 [to the Model Rule], however, corporate attorneys will not be obligated to make their role clear in every interview with an employee").

[16] Part II of this Article contains recommendations for best practices that exceed the obligations under the Rules.

[17] INDIANA RULES OF PROF'L CONDUCT R. 4.3.

[18] Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 929.

[19] INDIANA RULES OF PROF'L CONDUCT R. 4.3.

[20] Duggin, *supra* note 18, at 930.

[21] *Id*.

[22] *Id*. at 865.

[23] Formation of the attorney-client relationship requires both a client's intention to seek legal advice, and the attorney's express or implied consent to the representation. *See* Upjohn Report, *supra* note 7, at 15–16.

[24] Cummings, *supra* note 4, at 675 (noting that "[t]he circuits are now split on whether an individual who believed that he was communicating confidences within the context of the attorney-client privilege may prevent a corporation from later waiving the privilege as it relates to those communications"). Cummings notes that the Second, Third, and Fourth Circuits find that corporate constituents may not prevent the disclosure of communications, whereas the Seventh and Tenth Circuits hold that corporate constituents may assert the privilege and prevent disclosure. *Id*. at 675, 677. With its decision in *Ruehle*, the Ninth Circuit appears to join the former category.

[25] *See supra* text accompanying note 5.

[26] As if striking an ominous chord to signal the entrance of a villain, the district court's opening refrain ends by foreshadowing, "Unfortunately, in this case, a law firm breached its duty of loyalty to a client . . . ." *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1111 (C.D. Cal. 2009).
[27] *Id*. at 1112.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Nicholas*, 606 F. Supp. 2d at 1113.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*. at 1114.
[36] *Nicholas*, 606 F. Supp. 2d at 1114.
[37] *Id*.
[38] *Id*.
[39] *Id*. at 1114–15.
[40] *Id*. at 1114.
[41] Upjohn Report, *supra* note 7, at 10.
[42] *Nicholas*, 606 F. Supp. 2d at 1117.
[43] *Id*.
[44] *Id*.
[45] *Id*. at 1117–21.
[46] *Id*. at 1121.
[47] *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009).
[48] *Id*. at 608 (citing *Clarke v. Am. Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992)).
[49] *Id*. at 608–09.
[50] *Id*. at 607.
[51] *Id*. at 609.
[52] *Ruehle*, 583 F.3d at 609.
[53] *Id*. at 610.
[54] *Id*.
[55] *Id*. at 612.
[56] The Seventh Circuit has adopted the same federal common law outlined in *Ruehle*. *See United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) (outlining the federal common law test and observing that the Seventh Circuit has previously adopted the test).
[57] John P. Stigi and Christina L. Costley, *Ninth Circuit Holds That Absence of "Upjohn Warning" Does Not Bar Admissibility in Criminal Prosecution of Statements Elicited By Corporate Counsel During Internal Investigation*, MARTINDALE-HUBBELL (Oct. 14, 2009).
[58] *Id*.