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**UPJOHN WARNINGS:  
RECOMMENDED BEST PRACTICES  
WHEN CORPORATE COUNSEL INTERACTS  
WITH CORPORATE EMPLOYEES**

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## I. EXECUTIVE SUMMARY

This Report and Recommended Best Practices are the product of a Task Force established in early-2008 by the White Collar Crime Committee of the American Bar Association's Criminal Justice Section. They are intended to address an increasingly-common question associated with the attorney-client privilege: What best practices should corporate counsel follow when interacting with corporate employees while conducting internal investigations on behalf of the corporate entity? In particular, what advice or warnings – commonly referred to as Upjohn warnings, or corporate Miranda warnings – should corporate counsel (attorneys for any legal entity that is distinct from its members) provide to corporate officers, employees, shareholders, directors and trustees (collectively referred to as “Constituents”<sup>1/</sup>) and how should counsel give those warnings?

Upjohn warnings are named after *Upjohn v. United States*, 449 U.S. 383 (1981), the case in which the Supreme Court made clear that the corporate attorney-client privilege applied to a much wider group of Constituents than the corporation's “control group.” Although *Upjohn*, itself, does not reach the issue of warnings, the case confirmed that communications between corporate counsel and corporate employees were potentially privileged. Out of the *Upjohn* decision, issues arose as to who held the privilege (the corporation, the corporate employee, or both) and who could waive the privilege associated with such communications.

Whether the corporation, the Constituent, or the corporation and the Constituent hold the attorney-client privilege has taken on special significance with the promulgation of federal corporate prosecution guidelines that have incentivized corporations under investigation to waive the privilege in order to gain cooperation credit. In the typical case, a corporation that is alleged

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<sup>1/</sup> “Officers, directors, employees, and shareholders are the constituents of the corporate organizational client.” MODEL RULES OF PROF'L CONDUCT R. 1.13(a) cmt. 1 (2004).

to have committed wrongdoing will retain counsel to conduct an internal investigation to assess the allegations and provide legal advice. Corporate counsel will, in turn, interview the relevant Constituents who possess knowledge about the allegations. Those interviews – involving only corporate counsel and the Constituent – are usually subject to a legitimate claim of attorney-client privilege.

But if the corporation later comes under investigation, especially federal investigation, it may seek to obtain cooperation credit – to mitigate criminal or civil regulatory exposure – by waiving the privilege and producing to the government the statements made by Constituents to corporate counsel during the internal investigation. Upjohn warnings have therefore emerged as the mechanism for making clear to Constituents that the corporation, and the corporation alone, is the holder of the privilege. In the absence of such warnings, Constituents may be able to assert that they, too, hold the privilege: that, as privilege holders, they elect not to waive the privilege, and that the corporation may not produce their statements to government investigators. By providing unambiguous warnings, corporate counsel may be able to limit later disputes over the extent and nature of the attorney-client relationship, and Constituents are better able to assess their own risks.

## **II. RECOMMENDED BEST PRACTICES**

The following “best practices” are intended to provide guidance to corporate counsel. As “best practices,” they sometimes go beyond what may be required by model rules and applicable case law. The objective is not 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.

**A. Suggested 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, and 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?

**B. Recommended Procedures to Follow**

Although the facts of the particular situation may call for different warnings, a number of general principles should guide Upjohn warning practices:

First, counsel should provide the warnings to the Constituent before the interview is conducted.

Second, counsel should orally advise the Constituent of the Upjohn warnings, and should utilize a prepared written statement to ensure that the warnings are consistently and accurately given in each interview.

Third, counsel should make a record that the warnings have been provided through, at minimum, handwritten notes or the creation of a contemporaneous memorandum of the interview.

### **C. Counsel Interviewing Constituents**

The following is suggested for the typical situation where corporate counsel seeks to interview a Constituent.

1. Upjohn warnings should inform the Constituent that the investigating attorney is representing the corporation and is not representing the Constituent.
2. The warnings should be explicit and unambiguous to ensure that the Constituent does not believe that the Constituent has formed an attorney-client relationship with the investigating attorney.
3. The purpose of the interview should be made clear so it is apparent that counsel is acting on behalf of the corporation, and that counsel is gathering information for the corporation in order to provide legal advice to the corporation.
4. Counsel should give the Constituent the opportunity to ask questions about the Upjohn warnings and counsel's role. This helps ensure that the Constituent understands the Constituent's relationship with counsel.
5. The warnings should inform the Constituent that the interview is subject to the attorney-client privilege and, as such, the interview is regarded by the corporation as confidential and the Constituent may not disclose the substance of the interview – questions asked by counsel and answers given to those questions – to third parties outside the corporation because that could effectively waive the privilege.
6. The warnings should further inform the Constituent that, while the interview is subject to the attorney-client privilege, the privilege belongs only to the corporation, not the Constituent. That means it is up to the corporation – and the corporation alone – to decide if or

when the substance of the interview should be disclosed to third parties (*i.e.*, without the consent of the Constituent).

**D. Other Issues for Consideration**

**1. Constituents Approaching Counsel**

The propriety, necessity and strategic advantage of providing Upjohn warnings are less apparent when a Constituent approaches corporate counsel. Indeed, the analysis will be fact-specific, with a particular focus on whether the Constituent is approaching counsel to self-report misconduct or to report alleged misconduct by others. This analysis is further complicated by whether the events being reported present a risk of criminal or civil exposure for the corporation. Factors that guide this analysis include, but are not limited to, the following: whether there is an apparent conflict of interest between the Constituent and the corporation; whether the Constituent is reporting facts that place the corporation and/or Constituent at risk of prosecution; whether the Constituent is a whistleblower as defined by the Sarbanes-Oxley Act and therefore subject to certain protections; and, finally, whether the Constituent is reporting events that question the integrity of the corporation's management or its public filings. The existence of a conflict at minimum necessitates counsel notifying the Constituent that counsel does not represent the Constituent. Moreover, as a best practice, counsel should provide Upjohn warnings whenever a likely conflict of interest exists.

**2. Supplementing Oral Warnings**

Counsel may wish to consider supplementing oral warnings by giving the Constituent Upjohn warnings in writing. Counsel may go even further by having the Constituent sign a written acknowledgment of the warnings.

Although using a written warning is not a common practice, they reduce the risk of later challenge to the warnings provided. On the other hand, handing out a written warning and asking someone to sign a statement can have a chilling effect on the Constituent's willingness to share information, which defeats the fact-finding purpose of the interview, especially if the Constituent has no reason to believe that counsel personally represents the Constituent.

One approach to this issue would be to provide written Upjohn warnings to all Constituents at the onset of a formal relationship with the corporation, such as when an employee is hired, or when the investigation is about to commence. That approach could have the benefit of setting Constituent expectations before any issue arises. On the other hand, those expectations may lead to the unintended consequence that Constituents are less cooperative and candid across a wide range of activities than they otherwise might be in the absence of such blanket warnings.

### **3. "Do I need a lawyer?"**

If, as is often the case, the Constituent asks whether the Constituent needs separate counsel, counsel should advise the Constituent that counsel cannot provide advice on that issue but that the Constituent has the right to have separate counsel. Given the prevalence of the issue, counsel may wish to advise that the Constituent has the right to have separate counsel as part of the Upjohn warning, without waiting for the Constituent to ask the question. If applicable, counsel may also consider advising the Constituent that the corporation has a policy of paying for the Constituent's counsel.

### **4. "What is my status? Is there a conflict of interest?"**

Related to the preceding question, it is common for counsel and the Constituent to discuss whether a conflict of interest exists between the corporation and the Constituent. If counsel believes a conflict of interest currently exists, counsel should consider advising the

Constituent of that belief. If conflicts of interest are discussed, counsel should emphasize that facts and circumstances can change, that the interests of the Constituent and the corporation could come into conflict with each other, that counsel will alert the Constituent of such a conflict if and when counsel learns of one, and that the Constituent should do the same.

#### **5. Separate Counsel for Constituents**

Even when no conflict of interest is apparent, the corporation should consider, when feasible, hiring separate counsel for employees and entering into a joint defense relationship with that counsel. The advantage of such an approach is that separate “pool counsel” will have an undivided interest in representing employees, which may facilitate the fact finding process. On the other hand, such a course may pose risks for the corporation because corporate prosecution guidelines have been known to penalize corporations that enter into joint defense arrangements with other parties.

#### **6. “What if I refuse to cooperate in this investigation?”**

In cases where the Constituent inquires about the consequences of not cooperating in the investigation, the Constituent should be informed of the pertinent corporate policies applicable to internal investigations. In particular, most corporate policies will discipline employees who refuse to cooperate in internal investigations, and such discipline can include termination of employment.

#### **7. Third Party Uses of Information**

Counsel may wish to advise the Constituent that third parties to whom the corporation may elect to disclose information include federal or state government agencies, who might ask the corporation for such information, and who might regard false statements provided to counsel

as a prosecutable offense. In addition, counsel may wish to consider advising the Constituent that the corporation presently has no position on the matter because the factual investigation is still under way.

#### **8. Confidentiality of Communications Between Counsel and the Constituent**

Counsel may further wish to provide to the Constituent further elaboration on the aspect of counsel's interaction with the Constituent that should be regarded as confidential. As a general matter, in order to preserve the attorney-client privilege only the actual questions asked and the actual answers given should be treated as confidential. This means that the actual underlying facts known to the Constituent are not necessarily confidential, and the Constituent is not precluded from, for instance, appropriately reporting allegations of wrongdoing based on those underlying facts to law enforcement authorities. On the other hand, some of the underlying facts known to the Constituent could include proprietary business and/or trade secret information that could be subject to a legitimate assertion of confidentiality by the corporation. To reconcile these competing concerns, counsel may wish to consider advising the Constituent to seek further legal advice should the issue arise.

#### **9. Joint Representation of the Corporation and the Individual**

There will inevitably be instances where the interests of the corporation and the Constituent appear, in the first instance, to be aligned. In that context, the corporation sometimes consents to having its corporate counsel represent both the corporation and the Constituent, provided no conflict of interest arises. There are, however, potential risks associated with the situation, which are discussed in more detail in Section VI of this Report, "Current Upjohn Warning Practices."

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The remainder of this Report provides the rationale for the foregoing Recommended Best Practices. Section III explores the establishment, history, and elements of the attorney-client privilege; Section IV reviews the United States Supreme Court's decision in *Upjohn v. United States*, and explains how it shaped Upjohn warnings; Section V reviews the codification of the warnings, in particular by the ABA; and Section VI describes current practices.

### III. THE ATTORNEY-CLIENT PRIVILEGE

#### A. Introduction

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”<sup>2/</sup> Indeed, as even the Department of Justice recognizes, it “is one of the oldest and most sacrosanct privileges under the law.”<sup>3/</sup> The privilege “rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”<sup>4/</sup> While the purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients,” it also “promote[s] broader public interests in the observance of law and administration of justice.”<sup>5/</sup> As such, it is “perhaps, the most sacred of all legally recognized privileges, . . . essential to the just and orderly operation of our legal system.”<sup>6/</sup> While

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<sup>2/</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The attorney-client privilege can be traced back to the Roman legal tradition. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 6.2.4, at 471 (2002). However, the earliest known cases referencing the attorney-client privilege date back to the 1570s and do not question the existence of the privilege. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2290, at 542 (John T. McNaughton ed., 1961).

<sup>3/</sup> United States Attorneys’ Manual, *Principles of Federal Prosecution of Business Organizations* § 9-28.710 (Attorney-Client and Work Product Protections) (2008), citing *Upjohn Co. v. United States*.

<sup>4/</sup> *Trammel v. United States*, 445 U.S. 40, 51 (1980).

<sup>5/</sup> *Upjohn Co. v. United States*, 449 U.S. at 389.

<sup>6/</sup> *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997); EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 6.2.4, at 471 (2002).

commentators have argued the merits of the attorney-client privilege for centuries,<sup>7/</sup> no other aspect of the privilege has prompted more controversy than its application to corporations.<sup>8/</sup>

The Supreme Court, in *Upjohn v. United States*, acknowledged that “complications in the application of the privilege arise when the client is a corporation, an artificial creature of the law, and not an individual.”<sup>9/</sup> It is from these complications that Upjohn warnings have evolved.

While a corporation may only speak through its Constituent, typically when in-house counsel, or outside counsel represent a corporation, the corporation itself is counsel’s only client.

Upjohn warnings should set appropriate expectations between the Constituent and the corporation. The warnings are intended: (1) to inform the Constituent that the Constituent is not a client; (2) to warn the Constituent that the corporation’s counsel is not bound to keep the Constituent’s information confidential; and (3) to 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.

## **B. Relevant Principles Underlying the Attorney-Client Privilege**

The attorney-client privilege and associated legal duty of confidentiality protect communications between an attorney and client. The attorney-client privilege applies only to private client communications, whereas the duty of confidentiality applies to all information gained from the representation. In the corporate context, an important consideration often is who qualifies as a client that may invoke the privilege. Typically, the client is the corporation, though Constituents may believe that they also are clients and later attempt to invoke the privilege over statements made to the attorney.

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<sup>7/</sup> BLACKSTONE’S COMMENTARIES ON THE LAW 683 (Bernard C. Gavit ed., Washington Law Book Co. 1941) (1892).

<sup>8/</sup> Gerald F. Lutkus, Note, *The Implications of Upjohn*, 56 NOTRE DAME L. REV. 887, 887 (1981); see also John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982).

<sup>9/</sup> *Upjohn Co. v. United States*, 449 U.S. at 389–90.

For example, a Constituent interviewed by corporate counsel as part of an internal investigation – undertaken so that counsel can learn pertinent facts and competently advise the corporation – may later claim that the statements provided to corporate counsel were subject to an attorney-client privilege held by the Constituent and the corporation. The Constituent may then assert that, as a holder of the privilege, it is up to the Constituent, not the corporation, to decide whether to waive the privilege to allow third parties – such as government investigators or members of the media – to obtain the statements.<sup>10/</sup> To defeat such a claim, corporations seeking to establish that they, and they alone, are the holders of the privilege have required that Upjohn warnings be provided to Constituents prior to any interview by corporate counsel.

### **1. What Is the Privilege?**

The attorney-client privilege is an evidentiary privilege,<sup>11/</sup> that protects the client from disclosures of private communications made by the client while seeking legal advice.<sup>12/</sup>

### **2. Elements**

The privilege itself covers only *client* communication made *in confidence*. The historical elements of the attorney-client privilege are as follows: “(a) Where legal advice of any kind is sought (b) from a professional legal adviser in his capacity as such, (c) the communications relating to that purpose, (d) made in confidence (e) *by the client*, (f) are at his insistence permanently protected (g) from disclosure by himself or by the legal adviser, (h) except the protection be waived.”<sup>13/</sup> In the corporate context, the identity of the client is of greatest concern

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<sup>10/</sup> See, e.g., *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005) (corporate employees subject to criminal prosecution based on statements made to corporate counsel sought to suppress those statements based on the alleged inadequacy of Upjohn warnings provided by the corporate counsel).

<sup>11/</sup> STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 28 (7th ed. 2005).

<sup>12/</sup> *Id.*

<sup>13/</sup> 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (emphasis added).

and was the focus of the *Upjohn* case.<sup>14/</sup> Therefore, determining when an attorney-client relationship is created informs the analysis of privilege in the corporate context.

### 3. Formation of the Attorney-Client Relationship

“A relationship of client and lawyer arises when: a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.”<sup>15/</sup>

#### a. Client Intent

A prospective client’s reasonable belief about the formation of an attorney-client relationship is critical to determining when the relationship arises. For instance, courts have found a relationship when the client reasonably relied on the attorney’s advice, even though the lawyer declined the representation.<sup>16/</sup> On the other hand, other courts have observed that “a party’s mere expectation that an attorney will represent him or her is insufficient to create an attorney-client relationship.”<sup>17/</sup>

While “most client-lawyer relationships are still formed the old-fashioned way,” a relationship may arise in a more casual manner.<sup>18/</sup> Formal indicia of the relationship are sufficient to show a relationship, but they are not prerequisites. A prospective client’s argument that a relationship has been initiated is bolstered when there is an exchange of personal

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<sup>14/</sup> *Upjohn Co. v. United States*, 449 U.S. at 389–97.

<sup>15/</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000); *see also Miller v. Mooney*, 725 N.E.2d 545, 549 (Mass. 2000); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542.

<sup>16/</sup> *See, e.g., Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

<sup>17/</sup> *Gramling v. Memorial Blood Ctrs.*, 601 N.W.2d 457, 459–60 (Minn. Ct. App. 1999); *see also Catizone v. Wolff*, 71 F.Supp.2d 365 (S.D.N.Y. 1999).

<sup>18/</sup> STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 19 (7th ed. 2005).

confidential information between the client and the attorney.<sup>19/</sup> A relationship can arise without a written contract.<sup>20/</sup> Furthermore, the client need not pay or agree to pay the lawyer.<sup>21/</sup> However, in addition to the client’s reasonable belief, the attorney’s actions must be considered in determining whether an attorney-client relationship is formed.

**b. Attorney Intent**

The attorney need not expressly consent to the representation in order for an attorney-client relationship to arise.<sup>22/</sup> Rather, if the attorney fails to deny the relationship and the attorney reasonably should know that the prospective client may rely on the attorney, a relationship may be formed.<sup>23/</sup> Specifically, where an attorney “knowingly obtains material [personal] confidential information from the client and renders legal advice or services as a result,” the attorney assents to the representation.<sup>24/</sup> Any conveyance of advice could trigger the formation of a relationship.

**4. Application to the Corporate Context**

As mentioned previously, application of the attorney-client privilege to corporations raises issues not present when the client is an individual. While corporations have a separate legal identity, they are also made up of individuals – employees, officers, directors, trustees, and shareholders (*e.g.*, Constituents) –who may, depending upon the circumstances, speak on behalf of and legally bind the corporation. The issue that then arises is who is the client for privilege purposes – exactly who does corporate counsel represent? Only the corporation? Only the

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<sup>19/</sup> See, *e.g.*, *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983).

<sup>20/</sup> ABA/BNA, *LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT* § 31:101.

<sup>21/</sup> *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 14.

<sup>22/</sup> *Id.*

<sup>23/</sup> *Id.*

<sup>24/</sup> *Dep’t of Corps. v. Speedee Oil Change Sys., Inc.*, 980 P.2d 371 (Cal. 1999).

Constituent? The corporation and the Constituent? Resolution of these issues is fact-specific, but the principles that serve as a guide are well known.

**a. Client Identity**

Typically, an attorney for a corporation represents the entity and not its Constituents.<sup>25/</sup> “A [corporation’s] lawyer . . . owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.”<sup>26/</sup> For example, when a corporation learns of an allegation of wrongdoing within the corporation, the corporation – in the guise of its senior management, board of directors, or committees of the board (such as the audit committee or a special litigation committee) – may call upon attorneys representing the corporation to conduct an internal investigation to determine whether the allegation can be substantiated and to provide legal advice to the corporation on an appropriate course of action. Under such circumstances, the attorney involved in the internal investigation will typically engage with the corporation’s Constituents to obtain the facts necessary to advise the corporation, and that is when Upjohn warnings typically will be given. Indeed, the Model Rules make clear that the corporation’s lawyer is responsible for clarifying the identity of the client to the Constituent whenever it appears that the Constituent has interests adverse to the entity.<sup>27/</sup>

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<sup>25/</sup> MODEL RULES OF PROF’L CONDUCT R. 1.13(a) & cmt. 1.

<sup>26/</sup> *Bobbitt v. Victorian House, Inc.*, 545 F.Supp. 1124, 1126 (Ill. Dist. Ct. 1982); see also *Rosman v. Shapiro*, 653 F.Supp. 1441, 1445 (S.D.N.Y. 1987) (“[I]n the ordinary corporate situation, corporate counsel does not necessarily become counsel for the corporation’s shareholders and directors . . .”).

<sup>27/</sup> MODEL RULES OF PROF’L CONDUCT R. 1.13(f).

**b. When Joint or Concurrent Representation May Arise**

Under certain circumstances, an attorney representing the corporation may also take on a joint or concurrent representation of the entity's Constituents.<sup>28/</sup> For example, if the Constituent approached the corporation's lawyer for advice and "[i]f the [Constituent] . . . makes it clear when he is consulting the corporation lawyer that he personally is consulting the lawyer and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise, [the Constituent] may have a privilege."<sup>29/</sup> Similarly, there may be situations where a corporation and its Constituents choose to be represented by the same attorney. Whether the attorney represents the corporation alone or also represents a Constituent is a question of fact, determined by the reasonable expectations of the parties under the circumstances.<sup>30/</sup>

The formation of an attorney-client relationship between the Constituent and corporate counsel hinges on the reasonable belief of the Constituent and the attorney's actions in light of that belief. The Constituent must have "manifested [his] intention to seek professional legal advice."<sup>31/</sup> For instance, the Constituent may approach the attorney to seek advice about his personal liability. Alternatively, the attorney may approach the Constituent to investigate possible wrongdoing, during which the Constituent may seek personal legal advice from the attorney as to the Constituent's own liability. In either instance, "due consideration" should be given to the unreasonableness of the Constituent's belief that the attorney is his personal representative, especially in instances where a "readily apparent conflict of interest exists

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<sup>28/</sup> *Id.*

<sup>29/</sup> *In re Grand Jury Proceedings*, 434 F.Supp. 648 (E.D. Mich. 1977).

<sup>30/</sup> See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

<sup>31/</sup> *Id.* at 1319.

between the organization and the Constituent claimed to be a co-client.”<sup>32/</sup> The more actions the attorney takes to discount the presence of an attorney-client relationship, the more unlikely it is that the Constituent has a reasonable belief that the Constituent is a client.

If counsel does not expressly discount a relationship with the Constituent, the counsel’s actions could implicitly assent to concurrent representation of the entity and Constituent. First, conversations between the attorney and the Constituent about the latter’s personal liability may imply a concurrent representation.<sup>33/</sup> Courts have imposed relationships when the Constituent conveys confidential information to the corporate counsel,<sup>34/</sup> and the attorney promises the Constituent confidentiality.<sup>35/</sup> However, the attorney does not enter into a relationship solely because the Constituent communicates with the attorney about issues relevant to the entity that are also relevant to the Constituent personally.<sup>36/</sup> “Normally a corporate director talking to corporate counsel should understand anything he told that attorney was ‘known by the corporation.’”<sup>37/</sup>

Second, when the attorney provides personal legal services for the Constituent, a concurrent representation is more likely established. For instance, courts have found a concurrent representation when the attorney appears on behalf of both the Constituent and the

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<sup>32/</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f; *see also* *Bobbitt v. Victorian House, Inc.*, 545 F.Supp. at 1126 (“[I]t is clear that the firm was representing the corporation and thus [the officer] could not have reasonably believed or expected that any information given to the firm would be kept confidential from the shareholders or from the corporation as an entity.”).

<sup>33/</sup> *United States v. Walters*, 913 F.2d 388 (7th Cir. 1990); *Montgomery Academy v. Kohn*, 50 F.Supp.2d 344 (D.N.J. 1999) (finding an attorney-client relationship when the director consulted the organization’s attorney about investment losses for which the director was later found responsible).

<sup>34/</sup> *Home Care Indus. v. Murray*, 154 F.Supp.2d 861 (D.N.J. 2001).

<sup>35/</sup> *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991).

<sup>36/</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14. *But see* *Montgomery Academy v. Kohn*, 50 F.Supp.2d 344 (D.N.J. 1999) (finding an attorney-client relationship when the director consulted the organization’s attorney about investment losses for which the director was later found responsible).

<sup>37/</sup> *Bobbitt v. Victorian House, Inc.*, 545 F.Supp. at 1126.

corporation.<sup>38/</sup> Likewise, a court has determined that relationship exists when the Constituent identifies the lawyer as his counsel to outsiders and the attorney does not clarify his role.<sup>39/</sup> Some affirmative action on the part of the attorney to implicitly create a relationship is necessary.

A pattern of dealing between the Constituent and the corporate counsel may support both the Constituent's belief that a relationship exists and the attorney's assent to that relationship. The corporate form is often disregarded in closely-held corporations and the interest of the shareholder may merge with that of the entity. In a "close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney."<sup>40/</sup> However, even in these instances, a concurrent representation will be unlikely if the attorney never purports to represent the Constituent.<sup>41/</sup> A longstanding personal relationship between the corporate counsel and a Constituent does not, by itself, show a reasonable belief by the client or implied assent by the attorney.<sup>42/</sup>

The American Bar Association's Committee on Ethics and Professional Responsibility issued a Formal Opinion, in 1991, that identified a number of factors that may help determine when a concurrent relationship is established: "(a) whether the attorney affirmatively assumed a duty of representation to the constituent, (b) whether the constituent was separately represented by other counsel in connection with his affairs, (c) whether the attorney had represented the constituent before undertaking to represent the organization, and (d) whether there was evidence

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<sup>38/</sup> *E.F. Hutton & Co. v. Brown*, 305 F.Supp. 371 (S.D. Tex. 1969).

<sup>39/</sup> *Advanced Mfg. Techs., Inc. v. Motorola, Inc.*, 2002 WL 1446953 (D. Ariz. 2002).

<sup>40/</sup> *Rosman v. Shapiro*, 653 F.Supp. 1441, 1445 (S.D.N.Y. 1987).

<sup>41/</sup> *Bowen v. Smith*, 838 P.2d 186 (Wyo. 1992).

<sup>42/</sup> *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 836 F.2d 1332 (Fed. Cir. 1988).

of reliance by the Constituent on the attorney as his or her separate counsel, or of the Constituent's expectation of personal representation."<sup>43/</sup>

## **B. Duty of Confidentiality to Prospective Clients**

Even if the corporation does not consent to counsel's concurrent representation of the corporation and the Constituent, the counsel interacting with a Constituent may have a duty of confidentiality to the Constituent as a prospective client.

### **1. Elements**

Attorneys are governed both by the evidentiary attorney-client privilege and by the broader duty of confidentiality to all clients and potential clients.<sup>44/</sup> "Even when no [attorney-client] relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation."<sup>45/</sup> Even if the attorney expressly denies the establishment of a relationship, the attorney remains bound by this duty.

### **2. Application to the Corporate Context**

In order for the duty of confidentiality to attach, the Constituent must be a prospective client. Therefore, the Constituent must seek personal representation from corporate counsel.<sup>46/</sup> For instance, a Constituent might approach corporate counsel about the Constituent's personal liability for actions taken during the Constituent's employment. Even if the corporate counsel clarifies that the counsel does not represent the Constituent individually, but rather only the corporation, corporate counsel still could be obligated to keep the Constituent's information confidential.

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<sup>43/</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991).

<sup>44/</sup> GILLERS, REGULATION OF LAWYERS: 27-28.

<sup>45/</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(b); see also *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978).

<sup>46/</sup> See *Montgomery Academy v. Kohn*, 50 F.Supp.2d 344 (D.N.J. 1999).

Whether a duty of confidentiality arises would again hinge on whether the Constituent reasonably believed that the Constituent was seeking legal advice from the Constituent's personal attorney. In the corporate context, the reasonableness of that belief may be questioned, as the Constituent usually knows that the Constituent is speaking to the corporation when speaking to corporate counsel.<sup>47/</sup> However, if the Constituent's belief was reasonable, corporate counsel would be bound by the duty of confidentiality and could not reveal the information learned from the Constituent to the entity itself.<sup>48/</sup> Whether or not this is truly an issue will depend on the facts and circumstances.

The foregoing helps to explain why it behooves corporate counsel to provide clear warnings to Constituents, lest counsel find themselves in a position where Constituents who claim the privilege and/or a right to confidential treatment prevent them from using the facts they have gathered to represent the corporation effectively.

#### **IV. UPJOHN AND ITS IMPACT ON THE ATTORNEY-CLIENT PRIVILEGE**

While many of the principles behind formation of the attorney-client relationship are clear, their application to corporations can be difficult. Before *Upjohn*, circuits were split over which Constituents were considered clients and, therefore, were covered by the privilege. The *Upjohn* decision extended the privilege to communication between corporate counsel and Constituents, but made it clear that the corporation is the client and the holder of the privilege. The corporation can waive the privilege to the detriment of the Constituent. Due to this conflict of interest, corporate counsel began giving warnings to prevent Constituents from asserting the privilege for themselves.

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<sup>47/</sup> *Bobbitt v. Victorian House, Inc.*, 545 F.Supp. at 1126.

<sup>48/</sup> *Cf. Montgomery Academy v. Kohn*, 50 F.Supp. 2d 344 (D.N.J. 1999); *Gilmore v. Goedecke Co.*, 954 F.Supp. 187 (E.D. Mo. 1996) (disqualifying a corporation's long-standing law firm from representing the corporation in a lawsuit brought by a Constituent who had consulted with a member of the firm before filing suit).

## A. The Corporate Attorney-Client Privilege Prior to *Upjohn*

Corporations have invoked the attorney-client privilege in cases dating back almost one-hundred years.<sup>49/</sup> For the greater part of the twentieth century, the Supreme Court “accepted tacitly the proposition that the attorney-client privilege available to individuals also was available to corporations, but it never had delineated the scope and meaning of the corporate attorney-client privilege.”<sup>50/</sup> Over time, however, a significant circuit split developed, and various federal courts of appeal adopted conflicting standards.<sup>51/</sup> Some courts extended the privilege to all communications between the attorney and members of the “control group” of the corporation.<sup>52/</sup> Other courts opted for the more restrictive “subject matter” test, extending the privilege to communications based on the “nature and purpose of the information imparted to the lawyer, not merely the identity of the source.”<sup>53/</sup> The split among the circuits was resolved in *Upjohn*, when the Supreme Court held that the attorney-client privilege extends beyond a comparatively small group of senior employees. Rather, it encompasses all employees who act within the scope of their employment and who are in a position to legally bind the corporation through such acts.<sup>54/</sup>

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<sup>49/</sup> See, e.g., *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915).

<sup>50/</sup> John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 443 (1982).

<sup>51/</sup> See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc) (applying a “subject matter” test for confidential communications made to secure legal advice); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1971) (applying a “subject matter” standard for communication in the scope of the employee’s duties); *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962) (applying a “control group” test); Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443; see also *Upjohn Co. v. United States*, 449 U.S. at 390–92 (describing the different standards espoused by the circuits).

<sup>52/</sup> See, e.g., *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962); see also GILLERS, REGULATION OF LAWYERS 32.

<sup>53/</sup> GILLERS, REGULATION OF LAWYERS 32; see also, e.g., *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1971); see also Lutkus, Note, *The Implications of Upjohn*, 56 NOTRE DAME L. REV. 887.

<sup>54/</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

## B. The *Upjohn* Decision

In *Upjohn*, the Supreme Court rejected the control-group test, opting instead for a broader rule that expanded the application of the privilege to certain lower level employees.<sup>55/</sup> *Upjohn* involved an internal corporate investigation into improper payments by *Upjohn* managers to foreign government officials.<sup>56/</sup> *Upjohn*'s general counsel and outside attorneys sent questionnaires to all foreign managers and interviewed the recipients of the questionnaires and other employees.<sup>57/</sup> In response to an IRS summons and on attorney-client privilege grounds, the corporation refused to produce the questionnaires, and the issue proceeded to litigation.<sup>58/</sup> The district court concluded that the privilege was waived.<sup>59/</sup> But on appeal, the Sixth Circuit found no waiver, holding instead that because the communications were outside the "control group," the communications were not the "client's" and no privilege attached.<sup>60/</sup>

The Supreme Court disagreed and reversed. First, it concluded that the control group test articulated by the Sixth Circuit frustrated a major purpose of the attorney-client privilege: full and frank communication of relevant information by employees of the client corporation to attorneys who are seeking to render legal advice.<sup>61/</sup> Second, the control-group test lacked certainty, resulting in disparate decisions regarding the employees to which the privilege applied.<sup>62/</sup> Finally, the test created a "Hobson's choice," by which the counsel had to choose

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<sup>55/</sup> *Id.* at 396–97.

<sup>56/</sup> *Id.* at 386–87.

<sup>57/</sup> *Id.* at 387.

<sup>58/</sup> *Id.* at 388.

<sup>59/</sup> *Id.*

<sup>60/</sup> *Upjohn Co. v. United States*, 600 F.2d 1223, 1226–28 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

<sup>61/</sup> *Upjohn Co. v. United States*, 449 U.S. at 390–91. The Court recognized that lower level employees, who would not otherwise fall within the control group, often possess the information needed by the corporation's lawyers. *Id.*

<sup>62/</sup> *Id.* at 390–93 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

interviewing lower-level employees (and risking disclosure of unprivileged information) or avoiding those interviews (and risking failing to gather sufficient facts).<sup>63/</sup>

To preserve the purposes behind the attorney-client privilege, the Court expanded its application beyond the “control group.” That led the Court to find a valid attorney-client privilege where: (a) the communications were made by Upjohn employees; (b) to counsel for Upjohn acting as such; (c) at the direction of corporate superiors; (d) in order to secure legal advice from counsel; (e) concerning matters within the scope of the employees’ duties; and (f) the employees “were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.”<sup>64/</sup>

Although the Court did not expressly endorse any particular test to determine the circumstances under which the corporate attorney-client privilege existed, commentators believe *Upjohn* accepted the so-called “Weinstein Test,”<sup>65/</sup> espoused by Judge Jack Weinstein and discussed by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*.<sup>66/</sup> But *Upjohn* made one noticeable addition: the employee’s subjective awareness of the legal purpose of the communication.<sup>67/</sup> The Court explained this element through the following discussion of case-specific facts:

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<sup>63/</sup> *Id.* at 390–91.

<sup>64/</sup> *Id.* at 394.

<sup>65/</sup> John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 461 (1982); Lutkus, Note, *The Implications of Upjohn*, 56 NOTRE DAME L. REV. 892; see also 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE ¶ 503(b)(04) (1975). The Weinstein Test required that (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee’s corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

<sup>66/</sup> 572 F.2d 596, 609 (8th Cir. 1977) (en banc).

<sup>67/</sup> *Upjohn Co. v. United States*, 449 U.S. at 394–95.

A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued “in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation.” It began “Upjohn will comply with all laws and regulations,” and stated that commissions or payments “will not be used as a subterfuge for bribes or illegal payments” and that all payments must be “proper and legal.” Any future agreements with foreign distributors or agents were to be approved “by a company attorney” and any questions concerning the policy were to be referred “to the company’s General Counsel.”<sup>68/</sup>

## V. FORMALIZING UPJOHN WARNINGS

### A. Codification through the ABA Model Rules

ABA Model Rules of Professional Conduct 1.13(f) and 4.3 appear to be logical extensions of the *Upjohn* decision, and were adopted after the decision was handed down.<sup>69/</sup> Both rules provide guidance with respect to an attorney’s obligation to provide warnings to Constituents.

#### 1. ABA Rule 1.13(f)

Rule 1.13 governs instances where a lawyer has an organization as a client. Section (f) of the Rule requires an attorney representing the corporation to identify to Constituents the attorney’s representation of the corporation alone “when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents.”<sup>70</sup>

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<sup>68/</sup> *Id.*

<sup>69/</sup> The Rules were adopted by the ABA House of Delegates in 1983, replacing the Model Code of Professional Responsibility. Although the Model Rules were adopted almost two years after the *Upjohn* case was decided, the Commission on Evaluation of Professional Standards (the Kutak Commission) began circulating proposed drafts of the Model Rules as early as 1980. Differences between the proposed draft of the Rules in 1980 and the Model Rules adopted in 1983 indicate that the Commission recognized the impact of the *Upjohn* decision on an attorney’s ethical obligations. Thus, while the legislative history of Rules 4.3 and 1.13 do not specifically reference the *Upjohn* decision, it is likely the decision was considered in revising the Rules. Regardless, the Rules are consistent with the purpose and scope of the attorney-client privilege as expressed by the Supreme Court in *Upjohn*.

<sup>70</sup> “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.” Model Rules of Prof’l Conduct R. 1.13. Under the predecessor ABA Model Code, there was no direct counterpart to Rule 1.13(f). While there are some Model Code provisions that track the language of other subsections of Rule 1.13, there is no counterpart to Rule 1.13(f). The original version of Rule 1.13(f) (formerly 1.13(d)), provided that “[i]n dealing with

Comments to Rule 1.13 shed additional light on the topic. Specifically, Comment [2]

explains:

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, *if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6* [dealing with confidentiality]. (Emphasis added).<sup>71/</sup>

In addition, Comment [10] provides the following guidance for situations where the interests of an organization and one of its Constituents become potentially adverse:

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

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an organization's directors, officers, employees, members, shareholders or other constituents, a lawyers shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part." In 1983, the Rule was amended to replace the last phrase with "when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." In 2002, "it is apparent" was replaced with "the lawyer knows or reasonably should know," and subsection (d) became subsection (f).

<sup>71/</sup> Rule 1.6 provides as follows:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (4) to secure legal advice about the lawyer's compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  - (6) to comply with other law or a court order.

Model Rules of Prof'l Conduct R. 1.6.

representation for that constituent individual, and that discussion between the lawyer for that organization and the individual may not be privileged.<sup>72/</sup>

These comments address issues associated with Upjohn warnings.<sup>73/</sup>

## 2. ABA Rule 4.3

Rule 4.3 is more general in scope, but has application here as well. It provides:

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 an 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.

Rule 4.3 is also similar to Disciplinary Rule ("DR") 7-104(A)(2), which provides that that during the course of a lawyer's representation of a client, a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel . . . ."<sup>74/</sup>

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<sup>72/</sup> On the other hand, Comment [11] acknowledges that these are fact-specific situations, stating that "[w]hether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case." Comments [3], [8], and [9] to the original Rule, which address the issues decided in Upjohn, became Comments [2], [10], and [11] of the current Rule, respectively.

<sup>73/</sup> As also discussed at note 69, *supra*, while the *Upjohn* decision is not specifically referenced in either the annotations to the ABA Rule or the legislative history, the language of the Rule itself and the Comments to the Rule essentially restate the Court's holding in *Upjohn*.

<sup>74/</sup> MODEL RULES OF PROF'L CONDUCT DR 7-104(A)(2). The original version of Rule 4.3, adopted in 1983, did not contain a prohibition on providing advice to an unrepresented person in the text of the Rule itself. That prohibition on providing advice was contained in the Comment to the original rule. In 2002, the prohibition on giving legal advice to unrepresented persons was moved from the Comment to the main text of Rule 4.3, consistent with the practice of the majority of states in restricting the prohibition to situations where the lawyer "knows or reasonably should know" that the interests of the unrepresented person are in conflict with the interests of his or her client. Other changes were also made to the Comment in 2002. In particular, "[i]n order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d) [now Rule 1.13(f)]." Model Rules of Prof'l Conduct R. 4.3 cmt. 1. Based on the cross-reference, it seems that Rule 4.3 was intended to be construed in conjunction with Rule 1.13(f) in determining what ethical guidelines an attorney should consider when representing a corporation.

### **3. The Relevance of the Model Rules to Upjohn Warnings**

Read together, 1.13(f) and Rules 4.3 clearly impose a duty on an attorney, during the course of his representation of a corporate client, to clarify his role when dealing with the corporation's Constituents if there is a conflict between the Constituent and the corporation and to correct any misunderstandings that may arise. This duty likely extends to former Constituents under Rule 4.3, insofar as they are "unrepresented."<sup>75/</sup> While the Rules provide general guidance regarding a corporate counsel's ethical duties, they are silent with respect to the standards and procedures that should govern when and how to give an Upjohn warning.<sup>76/</sup>

### **4. Adoption of the Model Rules by Various Jurisdictions**

According to an ABA survey,<sup>77/</sup> the Model Rules have been adopted to date in forty-nine jurisdictions: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. California, Maine, and New York are the only states that do not have professional conduct rules that follow the ABA Model Rules.

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<sup>75/</sup> See *Upjohn Co. v. United States*, 449 U.S. at 394 & n.3 (declining to decide whether the attorney-client privilege should apply to communications with former employees); Annotation to Model Rules of Prof'l Conduct R. 4.3.

<sup>76/</sup> For instance, Comment [11] to Rule 1.13(f), which provides that whether a warning is to be given will depend on the facts of each case, leaves an attorney with no more clarity than was provided in the *Upjohn* decision.

<sup>77/</sup> Available at [http://www.abanet.org/cpr/mrpc/alpha\\_states.html](http://www.abanet.org/cpr/mrpc/alpha_states.html).

## **B. Illustrative Post-Upjohn Cases**

Discussed here are four cases, decided after *Upjohn*, which shed added light regarding the standards for determining when Upjohn warnings are necessary, the contents of such warnings, and the record needed to demonstrate that the Warnings were given.

In *United States v. Stein*, the KPMG tax shelter case that was affirmed by the Second Circuit, the district court addressed an employee's claim that corporate counsel was personally representing her.<sup>78/</sup> In that case, a partner at KPMG was questioned by counsel hired by the accounting firm in the course of an IRS investigation. The court noted that the partner did not recall receiving Upjohn warnings.<sup>79/</sup> The court stressed that the question of whether a personal attorney-client relationship existed "could be avoided if counsel in these situations routinely made clear to employees that they represent the employer alone and that the employee has no attorney-client privilege with respect to his or her communications with employer-retained counsel."<sup>80/</sup> Even without adequate warnings, however, the court concluded that no personal attorney-client relationship existed between the employee and corporate counsel.<sup>81/</sup>

The Second Circuit addressed a similar issue in a case involving whether a campaign manager for the International Brotherhood of Teamsters had formed a personal attorney-client relationship with outside counsel hired to investigate the organization's fundraising activities.<sup>82/</sup> The court highlighted counsel's failure to clarify that they did not represent the employee. The court then reminded outside counsel that "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

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<sup>78/</sup> 463 F.Supp.2d 459 (S.D.N.Y. 2006).

<sup>79/</sup> *Id.* at 460.

<sup>80/</sup> *Id.*

<sup>81/</sup> *Id.* at 466.

<sup>82/</sup> *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 217 (2d Cir. 1997).

possible.”<sup>83/</sup> As in *Stein*, even without adequate Upjohn warnings, the court in this case determined that the employee could not assert a personal attorney-client privilege to prevent the disclosure of information obtained during the investigation.<sup>84/</sup>

In *In re Grand Jury Subpoena*,<sup>85/</sup> the Fourth Circuit emphasized the importance of clear Upjohn warnings. In that case, after performing an internal investigation that included employee interviews, America Online (“AOL”) agreed to cooperate with the government and produce privileged documents related to the investigation.<sup>86/</sup> After their indictment on various federal criminal charges, three of the interviewed employees sought to prevent the disclosure by claiming that they had an attorney-client relationship with AOL’s investigating attorneys and that they were unwilling to waive the resulting attorney-client privilege. AOL, by contrast, waived the privilege and was prepared to turn over the employee interview memoranda in order to secure cooperation credit with the Department of Justice.

To determine if the attorney-client privilege was held by the employees, the court analyzed whether the investigators’ Upjohn warnings were adequate to prevent a reasonable person from believing that an attorney-client relationship existed.<sup>87/</sup> AOL’s outside counsel, the investigators in the case, provided similar Upjohn warnings to each of the three employees who were interviewed. One of the warnings was as follows:

We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to

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<sup>83/</sup> *Id.*

<sup>84/</sup> *Id.*

<sup>85/</sup> 415 F.3d 333 (4th Cir. 2005).

<sup>86/</sup> *Id.* at 337.

<sup>87/</sup> *Id.* at 339.

waive it. If there is a conflict, the attorney-client privilege belongs to the company.<sup>88/</sup>

Further, the AOL outside counsel conducting that interview mentioned that “counsel ‘could’ represent [the employee] as well, ‘as long as no conflict appeared.’”<sup>89/</sup> After analyzing the warnings, which the court characterized as “watered down,” the court nonetheless rejected the employees’ argument that they could have reasonably believed that an attorney-client relationship with AOL’s counsel had been formed. In reaching this conclusion, the court relied, in part, on the fact that the statements warned the employees that the corporation had the sole discretion to disclose the information.<sup>90/</sup> The court also emphasized that the statement, “‘we *can* represent you’ is distinct from ‘we *do* represent you.’”<sup>91/</sup> Because the warnings, understood in context, prevented the employees from forming a reasonable belief that the investigating attorneys were representing them, the court ruled that AOL alone, not the employees, could elect to waive the privilege.<sup>92/</sup>

Most recently, the Ninth Circuit passed upon the adequacy of the record created to determine whether Upjohn Warnings had been given by corporate counsel during the course of an internal investigation.<sup>93</sup> In that case, outside counsel for Broadcom Corporation were called in to investigate allegations of illegal stock option backdating, and interviewed the company’s Chief Financial Officer. Broadcom later turned the CFO’s interview over to third parties – the

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<sup>88/</sup> *Id.* at 336.

<sup>89/</sup> *Id.*

<sup>90/</sup> *Id.* at 340.

<sup>91/</sup> *Id.*

<sup>92/</sup> *Id.*

<sup>93</sup> *United States v. Nicholas*, 606 F.Supp.2d 1109 (C.D.Cal. 2009), *rev’d on other grounds sub. nom.*, *United States v. Ruehle*, No. 09-50161, \_\_\_ F.3d \_\_\_, 2009 WL 3152971, (9th Cir. Sept. 30, 2009).

Company's outside auditors, the SEC and the Department of Justice – without seeking the CFO's authorization.

Following his indictment on federal securities fraud charges related to the backdating scheme, the CFO moved to suppress his interview contending that Broadcom breached the attorney-client privilege through the unauthorized disclosure of his statements to third parties. In opposition to the motion, the government argued, in part, that the CFO had no expectation that his communications with Broadcom's outside law firm would be kept confidential because the CFO had supposedly received Upjohn Warnings from counsel before being interviewed.

The district court sided with the CFO, and ordered the suppression of the CFO's statements to Broadcom's law firm. In support of that ruling, the court found that the CFO was a client of the law firm because the firm had also represented the CFO in his personal capacity, that the outside law firm therefore had two clients (Broadcom and the CFO), that California state law presumes that all attorney-client communications are confidential.

The district court also rejected the argument that Upjohn Warnings cured the situation. First, the court expressed its "serious doubts" whether Upjohn Warnings had ever been given to the CFO – based on the fact that the CFO did not remember being given the Warnings, that the Warnings were not memorialized in the lawyers' notes, and that no written record of the Warnings existed.<sup>94</sup> Second, the court further noted that, even if Upjohn Warnings had been given, they were "woefully inadequate under the circumstances" because the lawyers never told the CFO that they were not the CFO's lawyers or that the CFO should consult with another lawyer.<sup>95</sup> And, "[m]ost importantly, neither [law firm lawyer] ever told [the CFO] that any

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<sup>94</sup> *United States v. Nicholas*, 606 F.Supp.2d at 1116.

<sup>95</sup> *Id.* at 1117.

statements he made to them could be shared with third parties, including the Government in a criminal investigation of him.”<sup>96</sup>

The Ninth Circuit, in *United States v. Ruehle*,<sup>97</sup> reversed the district court’s suppression order, but did not disturb the lower court’s factual findings that Upjohn Warnings had not been given. The Ninth Circuit concluded that the district court had used the wrong legal standard in its analysis (California state law, instead of federal common law), that under federal common law principles the CFO had the burden of showing that he intended his communications with the law firm to be kept confidential, and that the record revealed that the CFO understood that his law firm communications would not be kept confidential because they would be disclosed to third parties – specifically Broadcom’s outside auditors.

Notably, the Ninth Circuit reached its conclusion that the CFO understood that his communications with the law firm were not confidential without disturbing the district court’s conclusion that Upjohn Warnings had not been given in this case:

the district court seems to have disbelieved the [law firm] lawyers who took no notes nor memorialized their conversation on this issue in writing, and it apparently credited [the CFO’s] testimony that no such warnings were given. We cannot say that this finding is clearly erroneous on the record before us.<sup>98</sup>

Accordingly, the *Ruehle* case further confirms that making a good record and following consistent practices when giving Upjohn Warnings can be critical. In addition, and as suggested by the district court opinion, counsel should endeavor to provide complete Warnings.

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<sup>96</sup> *Id.*

<sup>97</sup> No. 09-50161, \_\_\_ F.3d \_\_\_, 2009 WL 3152971, (9th Cir. Sept. 30, 2009).

<sup>98</sup> \_\_\_ F.3d at \_\_\_ n. 3.

## **VI. CURRENT UPJOHN WARNING PRACTICES**

Based on recent cases and applicable ethics rules, it is not altogether surprising that attorneys involved in internal investigations, or matters arising out of internal investigations, use different variations of Upjohn warnings, depending on the facts presented by the particular matter. Nonetheless, given the frequency of use of Upjohn warnings, a set of guidelines may be helpful.

The practices of attorneys who conduct internal investigations reveal several trends in the area of Upjohn warnings. First, some practitioners interviewed by the Association of Corporate Counsel seem concerned that the Upjohn warnings may discourage Constituent candor during an interview or harm the relationship between the Constituent and the corporation. In some cases, these concerns may lead the attorney to give a watered-down warning. Despite these fears, experiences of practitioners suggest that the Upjohn warning rarely causes a Constituent to refuse to answer questions. Most Constituents cooperate with the investigation even when it is against their interest to do so because the immediate consequence they face – potential termination for lack of cooperation – is regarded as the more immediate risk.

Second, Constituents typically ask counsel whether they need their own attorney. While views on this issue vary, most agree that counsel should not assure Constituents that they do not need their own counsel. Rather, counsel typically advise Constituents that counsel represents the corporation, and that the choice of counsel is a decision for the Constituent to make. According to recent commentary on the issue, “While many lawyers believe that employees, if given the opportunity, would almost always choose their own counsel, in fact the opposite is often the

case. Employees in an investigation often begin with a view that their interests are aligned with the corporation and want to be viewed as team players.”<sup>99/</sup>

Third, in some situations, corporate counsel advise Constituents whether counsel believe the interests of the corporation and the Constituent are aligned. But such advice necessarily depends on counsel’s current knowledge of the facts, and counsel typically advise Constituents that the facts may change.

Fourth, practitioners seldom use written or formalized warnings (unless the issue of joint representation arises, as discussed in more detail below). Although written acknowledgment of the Upjohn warnings could eliminate Constituent confusion and rebut subsequent claims regarding privilege, most corporate counsel use oral rather than written warnings. This choice is likely connected to ensuring Constituent cooperation.

Many corporate counsel believe that written warnings are too formal. Counsel do not want internal investigations to turn into a law enforcement interrogation, lest employee candor be stifled and the fact-finding process hindered. Constituents may be able to claim that they received inadequate warnings whenever the formalized warning is not followed precisely.

Fifth, situations also arise when corporate counsel advise Constituents that they jointly represent the corporation and the Constituent. A joint representation may be ethically possible when the facts show the absence of a conflict of interest between the corporation and the Constituent. The typical joint representation occurs following the completion of an internal investigation when the facts are better understood and when a regulatory inquiry has commenced. In that context, the corporation sometimes consents to having its corporate counsel represent both the corporation and its Constituents, provided no known conflict of interest exists.

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<sup>99/</sup> See David B. Bayless, *Untangling the Ethical Issues of Internal Investigations*, GC CALIFORNIA MAGAZINE, Aug. 12, 2008, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202423698079>.

The benefits of joint representation include the fact that both the company and the Constituent signal each other that they do not believe the employee's interests to be at odds with the company's interests. But known facts invariably change during the course of internal investigations; counsel cannot jointly represent parties with conflicting interests and must withdraw from representing one or both parties. To address this situation and to reduce the chances for ambiguity or confusion, corporate counsel typically advise Constituents, in writing, of the terms of the joint representation, and include Upjohn warnings as well.

One of the more common problems involving joint representations arises when one of the clients (usually the corporation) wants to waive the privilege and the Constituent does not. For instance, corporations have attempted to garner cooperation credit from government agencies through privilege waivers. To address the issue, the corporation sometimes seeks and secures approval from the Constituent at the commencement of the joint representation that the corporation can waive the privilege, and can choose to reveal information to third parties, including allowing information obtained from the Constituent to be revealed.

On the other hand, depending on the nature of the matter and the resources available to the corporation, some corporations seek to avoid the joint representation issue by arranging for separate counsel to represent one or more Constituents. In such cases, counsel for the corporation and the Constituents have entered into formal or informal joint defense arrangements to facilitate the sharing of information. The risk of such approach is that some government agencies have regarded the arrangement as evidencing a lack of cooperation by the corporations.<sup>100/</sup>

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<sup>100/</sup> The Memorandum issued by then-Deputy Attorney General Thompson in 2003 was explicit on that point. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003). The more recent Principles of Federal Prosecution of Business Organizations

## VII. CONCLUSION

Internal investigations are fact-specific exercises. That means that no single set of Upjohn warnings will apply to all situations. Nevertheless, Upjohn warnings have value in creating reasonable expectations for corporations and their Constituents as to the scope and application of the attorney-client privilege.

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issued by the Department of Justice on August 28, 2008 now provide, at Section 9-28.730 (Obstructing the Investigation), a somewhat more nuanced view of the issue. They state:

[T]he mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.

*Available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>.*

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