**BACKGROUND:** In *Upjohn Co. v. United States,* 449 US 383 (1981), the United States Supreme Court noted that for persons in a corporation, the legal department or outside counsel are often consulted to determine "how to obey the law". 449 US at 392. The Court noted that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." 449 US at 393. The "*Upjohn* warning", sometimes referred to as "the corporate *Miranda*[1] warning", stems from the Court's guidance as to legal advice.[2]

In the *Upjohn* case, "[t]he communications at issue were made by Upjohn employees to counsel for Upjohn, acting as such, at the direction of corporate superiors in order to secure legal advice from counsel" and "the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." 449 US at 394. Examining in detail the totality of the circumstances under which the communications were made, the Court found that "[c]onsistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure." 449 US at 395. The Court made clear, however, that it only addressed the facts of the case before it, and did not establish rules that would apply in all instances.

Chief Justice Burger concurred in the judgment and part of the decision, but disagreed with the conclusion that the Court should not provide guidance as to when the attorney-client privilege applies in a corporate setting. "Because of the great importance of the issue, in my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct." 449 US at 402-403.

This recommendation has been used to develop the sample that appears on the following page. To ensure that the person being interviewed understands the effect, the warning should be discussed with them prior to any questions or other steps, and it is most helpful if the person provides an affirmative acknowledgement, either by signature, recorded interview, or otherwise.[3]

In addition to the historical origin of the *Upjohn* warning, the American Bar Association Model Rule 1.13 provides guidance when an attorney has an "Organization as Client" as to the nature of the Client-Lawyer Relationship. Model Rule 1.13(f) states that "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client

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[1] From the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] When the Court dismissed the case of *In re Grand Jury*, Docket 21-1397, in January 2023 after oral arguments, it left to the the lower court any determination as to when the privilege applies if the client asks for both legal and business advice, often the situation in which in-house attorneys find themselves.

[3] It may be worth noting that unlike a *Miranda* warning, if the corporation fails to provide an *Upjohn* warning to an individual, and the court finds the attorney-client privilege is to the corporation and not the individual, there is little to no recourse for the individual to seek protection over their information.

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 Rule 1.13(g) underscores that it is the organization which is the client because if there is in a Conflict of Interest situation and the attorney may be asked to provide dual representation of the organization and an individual, it is for the *organization*, under Model Rule 1.7, to provide consent, not for the individual.

Often if outside counsel is engaged in the investigation, they will have their own warning, and possibly waiver document, the content of which may differ from the text below, as well as their own process to advise the person who has been asked to assist in the investigation. The below presumes the meeting is being held with inside counsel, and the text should be adjusted if provided by outside counsel.

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# SAMPLE Upjohn Warning

The company is investigating **[the matter].** We are asking you to provide information about **[the matter]** so we (or outside counsel) can give legal advice to the company. There may be other investigations, including from governmental agencies and with outside counsel. The investigation may remain internal, or could require us to report to governmental and regulatory agencies, or respond to potential litigation.

In my role as counsel, I represent the company only. The company is not only my employer, but legally is my client. I do not represent you or any other employees personally.

Our interview today is confidential and subject to the "attorney client privilege." This generally means that no one can force you or me to disclose in court what we tell each other today. Understand, however, that the privilege belongs to the company, not to you personally. In the future, the company may decide to waive the privilege and disclose the information we learn in the investigation. If the company chooses to waive the privilege, it can do so without your consent and is not obligated to tell you when it does so. I will do what I can to inform you if the company is going to waive the privilege and disclose the contents of our discussion, or to reveal any documents you may provide to me or that we will create.

For the company to maintain its attorney client privilege over the information from this interview, it is important that you not share the substance of our interview with anyone. Keeping this interview confidential also will protect you if a government or regulatory entity or any other person or organization ever decides to interview you again about what happened.

The company will not tolerate any retaliation or reprisals against you for cooperating with our investigation and telling the truth. On the other hand, failure by employees to cooperate with the investigation may result in company discipline, including possible termination of employment.

As I said earlier, I am the attorney for our company, not for you. If you want a lawyer, you will need to hire your own. You may decide that before we speak, and we will schedule a meeting after you have had time to obtain a lawyer, at which your lawyer may be present. We need to hold that meeting within **[timeframe]** so please keep that in mind. Because the lawyer represents you alone, the company cannot assist you to pay for the lawyer.[4]

**[ask if there are any questions, and if not, will the person sign an affidavit to the above?]**

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[4] There may be situations where the company will provide financial assistance if an employee obtains their own attorney.

# SAMPLE Upjohn Affidavit[5]

My name is **[NAME]** and I am employed by **[COMPANY]** in the capacity/role of **[TITLE]**. I have been informed that the company is investigating **[the matter]** and I have been asked to provide information about **[the matter]** so that legal advice can be provided to the company.

I have been informed that **[ATTORNEY]** represents the company only and does not represent any employees personally. I have been informed that the discussion today is confidential and subject to the "attorney client privilege" but that the privilege belongs to the company, not to me. I was informed that the company may decide to waive the privilege and disclose the information discussed today, and that the company can do so without my consent and is not obligated to tell me when it does so.

I understand that I am required to keep the discussion held today, and any subsequent discussions, confidential and I may not disclose the contents of the discussion, any information I know or provide, and the contents of any documents or other materials without the specific written consent of the company, signed by an authorized officer or other signatory of the company.

I have been given the opportunity to seek outside counsel of my own. I have decided to proceed with today's discussion without having a lawyer present to represent me. I may, in the future, elect to have an attorney present to represent my interests separate from those of the company.

_____

Signature

Date: _____

[5] It is a good idea to review this, as with any similar document, with outside counsel as it should be specific to the situation for your company and the matter being investigated. You may be able to have a version created for internal use which is less rigorous than the sample, given the ABA's guidance in Model Rule 1.13. If outside counsel is involved in the investigation, your outside counsel likely has their own format for both the *Upjohn* warning and any documentation of assent by the individual.