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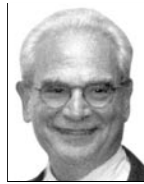
WHITE-COLLAR CRIME

Expert Analysis

'Adnarim' Warnings in Corporate Internal Investigations



By **Elkan Abramowitz**

And **Barry A. Bohrer**

In 1966, the Supreme Court adopted the *Miranda* rule to ensure that law enforcement agencies and courts followed concrete constitutional guidelines to prevent "the coercion inherent in custodial interrogation [which] blurs the line between voluntary and involuntary state-ments."[1] These guidelines require the provision of certain warnings before an individual can be questioned. The warnings are wellknown and include the right to counsel and the possibility that incriminating statements may be used against the person.

There has been much scholarly discussion lately regarding the strict application of something like the *Miranda* warnings in the context of corporate internal investigations and the interview of corporate employees by counsel for the corporation. For decades, corporate attorneys conducting such interviews typically advised employees that: (1) the attorney represents the corporation, not the employee; (2) any information imparted to the attorney is privileged, but the privilege is held by the corporation, not the employee; and (3) the corporation, not the employee, determines whether to waive the privilege and share any information imparted by the employee with third parties.

The provision of these *Upjohn* warnings always has served the dual purpose of ensuring that: 1) the corporation maintains control of its attorney-client privilege; and 2) the ethical obligation of an attorney to disclose conflicts is upheld.[2]

> Former U.S. District Judge Frederick Lacey coined the term 'Adnarim' (Miranda spelled backwards) for cautionary warnings to corporate employees.

Two recent federal cases demonstrate that corporate counsel may need to expand the way they think about the delivery and purpose of these warnings in recognition of the almost coercive pressure that may exist on employees interviewed during an internal investigation and that such compulsion may distort the investigative process. Former U.S. District Judge Frederick Lacey coined the term "Adnarim" (Miranda spelled backwards) for such cautionary warnings. The application of this term suggests that these warnings may be utilized to serve a constitutional purpose like the *Miranda* warnings. As suggested by one commentator, "[t]he question then arises whether the *Miranda* analogy should be extended farther so as to render such [*Upjohn*] warnings not just advisable but joined with an exclusionary rule, or even more extreme, use-immunity for statements provided."[3]

'United States v. Nicholas'

A federal district court judge in Los Angeles recently suppressed a significant portion of the government's evidence in its stock options backdating case against a corporate executive after ruling that lawyers representing the corporation failed to explain clearly to the executive that they were representing only the company.[4] The law firm involved, Irell & Manella LLP, had a longstanding relationship with the company, Broadcom. Beginning in 2002, the firm had represented both the corporation and its Chief Financial Officer, William Ruehle, personally, in several securities-related actions. In May 2006, Irell agreed to simultaneously represent Broadcom in connection with the company's internal investigation of its stock option granting practices and Mr. Ruehle in two shareholder lawsuits centered on the same stock option granting practices.[5]

Irell never obtained Mr. Ruehle's informed written consent to its dual representation of him and the company. In addition, Mr. Ruehle consistently received e-mails from Irell attorneys

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regarding the firm's representation of him and Broadcom in connection with the company's stock option practices. As detailed in the court's opinion, the day before his first interview with Irell's lawyers on the backdating investigation, he received three e-mails from a litigation partner at Irell. The first updated him on the firm's progress in their interviews of witnesses with knowledge of Broadcom's granting practices. The second asked Mr. Ruehle to review his personal records for information related to a specific grant and advised him of the relevance of such information to the investigation. Finally, he was provided a further update on the firm's fact-gathering efforts.

On June 1, 2006, two Irell lawyers met with Mr. Ruehle and interviewed him regarding his knowledge of Broadcom's stock option granting practices. The lawyers did not tell Mr. Ruehle that they were not his lawyers and did not suggest that he might want separate representation. Nor did the attorneys advise Mr. Ruehle that his statements may be disclosed to third parties at the corporation's discretion.

The Securities and Exchange Commission (SEC) formally commenced its investigation into Broadcom's practices in June 2006. Mr. Ruehle continued to receive legal advice from Irell during this time. In August 2006, at Broadcom's direction, Irell disclosed the substance of Mr. Ruehle's interviews with Irell attorneys to Broadcom's outside auditors. Soon thereafter, the same information was disclosed to the SEC and the U.S. Attorney's Office in connection with their investigations of Broadcom. Mr. Ruehle did not consent to any of these disclosures.

In December 2008, Mr. Ruehle learned that this information had been disclosed to the government when summary memoranda of his interviews were produced to him in connection with the government's criminal case against him. The district court held an evidentiary hearing to determine whether Mr. Ruehle's statements to Irell lawyers were subject to the attorney-client privilege.

"Determining whether an attorney-client relationship exists depends on the reasonable expectations of the client" and "hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice."[6] The court found that "[t]here is no serious question in this case that when Mr. Ruehle met with Irell lawyers on June 1, 2006, [he] reasonably believed that an attorneyclient relationship existed, he was communicating with his attorneys in the context of this relationship for the purpose of obtaining legal advice, and that any information he provided to Irell would remain confidential." According to the court, this reasonable belief properly was based on the advice and e-mail communications he received from the firm's attorneys and his understanding that the interviews were being conducted to gather information in preparation for the shareholder lawsuits filed against him.

The court in 'United States v. Nicholas' found that '[t]here is no serious question in this case that when Mr. Ruehle met with Irell lawyers on June 1, 2006, [he] reasonably believed that an attorney-client relationship existed…'

Mr. Ruehle testified that if he had any reason to suspect that his conversations might have been disclosed to third parties he would have, at a minimum, "stopped and asked some very serious questions at that time." The court noted that Mr. Ruehle was a sophisticated corporate officer with substantial civil litigation experience and that he would never have agreed to provide information that Irell could then turn over to the government in the context of a criminal investigation against him.

The government argued that Mr. Ruehle's statements were not privileged because he had been given an *Upjohn* warning by the Irell lawyers. The court expressed its doubts as to whether any such warnings had been provided, but found that even if they were given to Mr. Ruehle, the substance of the warning testified to by the lawyers was "woefully inadequate under the circumstances."

"Perhaps more critically, however, whether an *Upjohn* warning was or was not given is irrelevant in light of the undisputed attor-ney-client relationship between Irell and Mr. Ruehle." Noting that an *Upjohn* warning is given to a nonclient to advise the employee that he is not communicating with his personal lawyer, no attorneyclient relationship exists, and any communication may be revealed to third parties if disclosure is in the best interest of the corporation, the court opined that no such circumstances existed in this case and that any oral warning given to Mr. Ruehle would have been insufficient. "An oral warning, as opposed to a written waiver of the clear conflict presented by Irell's representation of both Broadcom and Mr. Ruehle, is simply not sufficient to suspend or dissolve an existing attorney-client relationship and to waive the privilege. An oral warning to a current client that no attorney-client relationship exists is nonsensical at best—and unethical at worst."

Given Irell's actions, the court found that the firm had breached its duty of loyalty to Mr. Ruehle. Noting the seriousness of the gov-ernment's case against Mr. Ruehle and the liberties at risk, the court found it necessary to intervene and suppress the evidence provided to the government by Irell. Further, "[b]ecause Irell's ethical misconduct has compromised the rights of Mr. Ruehle, the integrity of the legal profession, and the fair administration of justice, the Court must refer Irell to the State Bar for discipline. Mr. Ruehle, the Government, and the public deserve nothing less."

Stanford Financial Case

A similar issue recently arose in the government's investigation of Stanford Financial Group, a financial services company, for fraud. Laura Pendergest-Holt was the company's chief investment officer. The government brought obstruction charges against Ms. Pendergest-Holt based on testimony provided to the SEC in February 2009.

Prior to meeting with the SEC, Ms. Pendergest-Holt met on numerous occasions with a partner from the law firm Proskauer Rose, LLP. This attorney also accompanied Ms. Pendergest-Holt to her sworn testimony before the SEC. In March 2009, Ms. Pendergest-Holt filed a civil complaint against the attorney and Proskauer Rose alleging legal malpractice, professional negligence, and breach of fiduciary duty. Specifically, Ms. Pendergest-Holt claimed that during her meeting with the SEC, she believed that the Proskauer attorney was acting as her attorney and that his legal malpractice resulted in her being charged by the government.[7]

Ms. Pendergest-Holt argued that based on her meetings with the Proskauer attorney, and based on representations that he made during her testimony preparation, she reasonably and actually believed that the defendants were acting as her lawyers, representing and protecting her interests. Instead, the complaint alleged that the defendants acted in the best interest of the Stanford Financial Group entities, even soliciting a multimillion-dollar retainer from the company the night before her scheduled SEC testimony. As a direct and proximate cause of the defendants' negligence, Ms. Pendergest-Holt claimed that she was wrongfully accused of a crime of which she is "completely and absolutely innocent."

The complaint further stated that at no time did the defendants advise Ms. Pendergest-Holt that they were not actually representing her personal interests, that she should seek separate counsel, that she had a Fifth Amendment right against self-incrimination, that she had the option of not appearing before the SEC, that there were potential criminal penalties associated with providing sworn testimony to the SEC, that the interests of her employer were adverse to her interests, that there was a conflict in representing her and her employer, and that there was no attorney-client privilege for communications between her and the defendants.[8]

Furthermore, during her testimony, the Proskauer attorney gave contradictory answers about whether he represented Ms. Pendergest-Holt, stating "I represent the company Stanford Financial Group and affiliated companies" and that he represented Ms. Pendergest-Holt "insofar as she is an Officer or director of one of the Stanford affiliated companies."[9] The lawyer's failure to adequately inform her of his representation of her employer, rather than her, was a violation of his ethical obligations, an act of malpractice and a breach of fiduciary duty.

Whether the defendants' actions were appropriate or sufficient will not be resolved in the context of this case, however. On April 10, 2009, the case against the Proskauer attorney and firm was dismissed without prejudice.

Conclusion

Commentators note that there is no perfect solution and that providing such warnings comes at a cost. In particular, the provision of detailed warnings may discourage employees from cooperating in an internal investigation. On the other hand, even after full disclosure by corporate attorneys, employees may feel compelled to cooperate at their own expense for fear of retribution from their employer should they not cooperate. "The warnings do not give employees a more informed sense of the particular risks they face. Suspects routinely waive *Miranda* rights during custodial interrogations; perhaps employees would similarly disregard the various 'Adnarim' warnings provided."[10]

Regardless, corporations and their lawyers should seek to ensure their employees are fully informed before providing information in the context of an internal investigation. The failure to do so may result in the suppression of evidence or a finding that the corporation's actions qualified as state action, as in the KPMG prosecution in the Southern District of New York.[11]

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1. *Dickerson v. United States*, 530 U.S. 428, 435 (2000).
2. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
3. Brandon L. Garrett, "Corporate Confessions" Cardozo Law Review, Vol. 30 at 945-56 (2008).
4. *United States v. Nicholas and Ruehle*, SACR 08-00139-CJC (C.D. Cal.).
5. Order Suppressing Privileged Communications, *United States v. Nicholas*, SACR 08-00139 (C.D.Cal. April 1, 2009).
6. Id. (citing *Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 652 (N.D.Cal. 1993); *United States v. Evans*, 113 F.3d 1457, 1465 (7th Cir. 1997)).
7. Plaintiff's Original Complaint, *Laura Pendergest-Holt v. Sjoblom*, 3:09-cv-00578-L (N.D.Tex March 27, 2009).
8. Id. at ¶9.
9. Id. at ¶10.
10. Garrett, "Corporate Confessions" at p. 944.
11. *United States v. Stein*, 440 F.Supp.2d 315 (S.D.N.Y. 2006).

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