New York Law Journal
White-Collar Crime
WWW.NYLJ.COM
An ALM Publication
JUNE 25, 2021

WHITE-COLLAR CRIME

Expert Analysis

A Warning About 'Upjohn' Warnings: A Word of Caution for Individual Employees

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There can be little doubt that the most famous warning in the American legal system is the *Miranda* warning. Absent a *Miranda* warning or a valid waiver of rights, a court may find that the statements a defendant made during custodial interrogation were unconstitutionally obtained and are therefore subject to exclusion.

In the context of a corporate internal investigation, the closest analogue to a *Miranda* warning is the *Upjohn* warning—sometimes referred to as the "corporate *Miranda*." When conducting an employee interview as part of an internal investigation, corporate counsel typically warns the employee that counsel represents the employer and not the employee, that any privilege attaching to statements made during the interview belongs solely to the company, and that the company may waive the privilege and disclose the contents of the interview to third parties, including the government.

But what if corporate counsel does not provide an *Upjohn* warning? Individual employees and their counsel may be surprised to learn that, unlike the remedy afforded to a non-*Mirandized* defendant, the remedy afforded to an employee who did not receive an *Upjohn* warning is lacking. Although an employee may later assert privilege over the statements made during an unwarned interview, the leading federal court decisions on this issue show that the employee must overcome an exceedingly high burden in order for the privilege assertion to be upheld.

In this article, after briefly explaining the origins and purposes of the *Upjohn* warning, we discuss the current state of the law as reflected in cases where employees have challenged the use of statements made to corporate counsel. From a review of those cases, including a recent decision in the federal prosecution of former Theranos founder and CEO Elizabeth Holmes, we conclude that although corporate counsel have good reason to continue providing *Upjohn* warnings, individual employees and their counsel will often be left with no meaningful remedy even if an *Upjohn* warning was not given.

Background and Origins of 'Upjohn' Warnings. The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege recognizes that "broader public interests in the observance of law and administration of justice" are best served when a client and attorney are able to exchange "full and frank communication," because such candid and confidential communications enable the attorney to provide "sound legal advice or advocacy." Id. When the privilege applies, it affords complete protection from disclosure over confidential communications between attorneys and their clients. At the same time, because the attorney-client privilege "stands in derogation of the public's right to every man's evidence," courts strictly confine its application. *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (marks and citations omitted).

At issue in the Supreme Court's 1981 decision in the case of *Upjohn Co. v.*

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United States was the scope of the corporate attorney-client privilege, and more specifically, whether the government could demand production of all statements that employees of the Upjohn pharmaceutical company made to corporate counsel as part of an internal investigation into possible foreign bribery. Although the appellate court had found that the attorney-client privilege protected only those communications that were between corporate counsel and those upper-level employees at Upjohn who were responsible for "directing Upjohn's actions in response to legal advice," the Supreme Court noted that the ability of counsel to provide sound legal advice to a corporate client will often require gathering information from "middle-level" or "lower-level" employees, since those employees can, "by actions within the scope of their employment, embroil the corporation in serious legal difficulties." The Supreme Court in *Upjohn* thus rejected the so-called "control group test" that had been adopted by the Court of Appeals, and found that when corporate counsel interviews a company's employees for the purpose of providing corporate legal advice, the privilege does not depend on the employee's role, seniority, or level of decision-making authority.

Also notable in *Upjohn* was the Supreme Court's focus on what it evidently viewed as an important fact: that during the communications that were the subject of a corporate privilege claim, "the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." Consistent with this aspect of *Upjohn*, corporate counsel conducting interviews as part of an internal investigation commonly put employees on notice of the nature of the interview, in part to protect the corporation's attorney-client privilege. As now widely used, an *Upjohn* warning serves several purposes. It ensures that if a regulator or outside entity seeks access to the statements an employee made during an internal interview, the record of the interview will confirm that the statements were part of privileged effort on the part of corporate counsel to gather information necessary for providing legal advice. And, just as importantly, the warning makes clear that the corporation alone controls that privilege, so that the employee cannot assert a personal privilege or otherwise prevent the corporation from disclosing the statements as it sees fit, including to the government.

In our current climate, the ability of a corporation to disclose unilaterally the statements its employees make during internal interviews is often of considerable importance. Prosecutors and regulators expect corporations to disclose information they obtain about misconduct their employees have committed, and corporations readily provide this information so as to receive cooperation credit and leniency in any potential resolution. In other words, an effective *Upjohn* warning allows corporations to do what they need to do: simultaneously satisfy the government's expectations for corporate cooperation *and* advance their own interests—even if it comes at the expense of individual employees that corporate counsel interviewed in their internal investigations.

'Upjohn' and Efforts To Assert an Individual Attorney-Client Privilege in the Corporate Setting. Despite the widespread use of *Upjohn* warnings in the context of internal investigations, situations nonetheless will arise in which those warnings are not given. What, then, are the rights of the employee under those circumstances? Stated differently, in those scenarios

where *Upjohn* warnings were not given, will counsel for the individual employee be able to preclude the disclosure of the statements the employee made?

Based on a review of the current case law, the answer is disappointing indeed. In fact, three representative cases—*In re Bevill, Bresler & Schulman Asset Mgmt.*, 805 F. 2d 120 (3d Cir. 1986); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 338 (4th Cir. 2005); and *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)—suggest that when an employee speaks to corporate counsel without having received clear *Upjohn* warnings, a remedy will exist only when the employee can establish the existence of an individual attorney-client relationship with the corporate counsel, which requires a showing that will be unrealistic for all but the most senior executives to meet, and will often be unrealistic even for them.

A review of the relevant case law begins with *Bevill*, which has been adopted by a range of other federal appellate courts and, while not directly involving an internal investigation or *Upjohn* warnings, significantly undercuts the ability of an employee to prevent the corporate disclosure and government use of statements obtained without the benefit of those warnings. In *Bevill*, individual executives of two related asset management corporations made statements to a law firm that the executives were seeking to retain both in their personal capacities and on behalf of the corporate entities

they controlled. The law firm determined that it could not represent the executives individually, and after civil and criminal investigations ensued, the trustee for the corporate entities waived privilege over the executives' conversations with the law firm and sought to compel the executives to testify about those discussions. The executives in turn fought the disclosure of their statements to the law firm, asserting that their discussions with corporate counsel had been protected not just by corporate privilege, but by a personal attorney-client privilege as well.

In affirming the district court's finding that the executives' statements were not protected by an individual attorney-client privilege, the Third Circuit effectively adopted what is now known as the *Bevill* test. Under the *Bevill* test, in order for a corporate employee to establish a personal attorney-client privilege as to communications with counsel, the employee must satisfy five criteria: (1) the employee approached counsel for the purpose of seeking legal advice; (2) when the employee approached counsel, the employee made it clear that he or she was seeking legal advice in an individual rather than representative capacity; (3) counsel actually communicated with the employee in the employee's individual capacity, knowing that a possible conflict could arise; (4) the conversations with counsel were confidential; and (5) the substance of the conversation with counsel did not concern matters within the company or the general affairs of the company. *Bevill*, 805 F.2d at 123. The Third Circuit also held that the executives "do not have an attorney-client privilege with regard to communications made in their role as corporate officials," id. at 125, thereby essentially precluding an individual employee from asserting privilege over any discussions other than those relating to purely personal legal matters.

In another case relevant to the remedies available upon a lack of clear *Upjohn* warnings, the Fourth Circuit in *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 338 (4th Cir. 2005) (hereinafter *In re AOL Subpoena*), neither accepted nor rejected the *Bevill* test, but rather adopted a test of its own. In *In re AOL Subpoena*, AOL's corporate counsel provided "watered down" *Upjohn* warnings to three employees during investigative interviews, with the warnings including the caveat that the corporation's attorneys "could" or "can" represent the employees, so long as no conflict of interest arose. Id. at 336. After a grand jury subpoenaed AOL for memoranda of the interviews, the employees moved to quash the subpoena on the grounds they had a personal attorney-client relationship with AOL's attorneys. In analyzing the assertion of individual privilege, the Fourth Circuit held that an employee seeking to invoke the attorney-client privilege over communications with corporate counsel must prove that he subjectively believed he was a client of the attorney, and that this subjective belief was reasonable. Under the circumstances before it, the Fourth Circuit affirmed the district court's rejection of the employee's privilege claims, noting among other things that the employees did not seek personal legal advice, the corporate counsel did not render personal legal advice, the employees did not ask corporate counsel to represent them, and the statement that corporate counsel "can" represent the employees does not create an attorney-client relationship.

In still another significant case, an employee's attempt to assert a personal attorney-client privilege over statements made to corporate counsel was unavailing. In *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009), corporate counsel interviewed the CFO of Broadcom in connection with alleged stock options backdating at the company. With Broadcom's authorization, corporate counsel later provided information from the CFO's interview to third parties—including Broadcom's outside auditors and the government. After a grand jury indicted the CFO, he asserted that his statements to corporate counsel were protected by a personal attorney-client privilege and therefore must be suppressed. The district court agreed, finding that the CFO reasonably believed that his statements to corporate counsel would be held in confidence in part because corporate counsel represented the CFO personally in connection with two civil actions related to options backdating, and because the district court had "serious doubts" as to whether corporate counsel provided an *Upjohn* warning to the CFO. The Ninth Circuit, however, reversed, holding that even if the CFO did not receive an *Upjohn* warning, his statements to corporate counsel were not protected by a personal attorney-client privilege because they were not made in confidence. In support of that conclusion, the Court cited the CFO's testimony that he understood the results of corporate counsel's investigations would be disclosed to Broadcom's outside auditors, his sophistication as a senior executive, and his understanding of general disclosure requirements imposed on a public company.

The Individual Privilege Assertion in 'United States v. Elizabeth Holmes'. The ongoing federal prosecution of Elizabeth Holmes offers the latest high-profile attempt by an executive to assert a personal-attorney client privilege over communications with corporate counsel. Much like the cases discussed above, however, the court's recent decision against Holmes reinforces the reality that

employees have little prospect of prevailing when making such assertions.

Holmes was the founder and CEO of Theranos, a company that provided what it purported to be groundbreaking blood-testing technology. In 2011, Theranos retained Boies Schiller to provide legal work on a variety of matters, and in addition to its work for Theranos, the firm also represented Holmes in her personal capacity on at least two occasions: in filing an intellectual property lawsuit in 2011 against a Theranos competitor, and in responding to a putative class action lawsuit filed in 2016. After Holmes was indicted on federal wire fraud and conspiracy charges, the government provided Holmes with its proposed trial exhibit list, and Holmes in turn objected to sixteen documents, including thirteen documents that she asserted are protected by her personal attorney-client privilege.

In response to Holmes's privilege assertion, the government filed a motion seeking an order that Holmes lacked a personal attorney-client privilege over the exhibits. Stating that the Ninth Circuit has adopted the *Bevill* test, the government argued that Holmes failed to meet several of its factors, including its second factor (that she made it clear she was seeking legal advice in her personal capacity rather than in her capacity as a corporate officer), third factor (that counsel communicated with Holmes in her personal capacity), and fifth factor (that her communications with corporate counsel did not concern Theranos matters). In her opposition to the motion, Holmes argued that Boies representation of Theranos and her "eventually expanded to many of the subjects now at issue in [her] criminal case and involved both litigation and non-litigation issues." As a result, Holmes argued that Boies Schiller represented Theranos and her jointly, and that such representation would continue unless a client discharged the firm, it withdrew, or the interests of the individual and the corporation diverged too much to justify their using the same attorneys. In so arguing, Holmes asserted that the *Bevill* test is inapposite, as it applies when determining whether an implied personal attorney-client relationship existed, not in the context of a joint representation.

On June 3, 2021, Magistrate Judge Nathanael M. Cousins issued a decision, holding that Holmes lacked a personal attorney-client privilege over the thirteen disputed documents. The court rejected Holmes's claim that the *Bevill* test did not apply in her case, noting that the Ninth Circuit expressly adopted that test in *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010). In applying the *Bevill/Graf* test, the court noted that Holmes failed to satisfy (1) the second factor (that she made it clear to Boies Schiller that she was seeking legal advice in her personal capacity and not in her role as a corporate representative), noting that there was no engagement letter reflecting Boies Schiller's representation of Holmes and/or Theranos and Holmes did not pay for the representation from her own accounts; (2) the fourth factor (that her communications with Boies Schiller were confidential), because none of the contested documents consisted of conversations solely between Holmes and Boies Schiller; and (3) the fifth factor (that conversations with Boies Schiller did not concern matters within the general affairs of Theranos), because none of the contested documents discussed Holmes's personal legal interests. Therefore, the court held that Boies Schiller did not jointly represent Holmes and Theranos, that only Theranos held a privilege over the thirteen contested documents, and that those documents were admissible because Theranos (through an assignee) had elected to waive the corporate privilege.

The decision in the Holmes prosecution underscores a broader point: all corporate executives, including those at the highest level, must clear a very high bar to successfully assert a personal attorney-client privilege over their statements to corporate counsel—a bar even Holmes, who was inextricably linked with Theranos, failed to clear.

Conclusion

Upjohn and its progeny expanded a corporation's attorney-client privilege, ensuring that the privilege applies to investigative interviews that corporate counsel conducts with employees of all levels. Corporate counsel are also well versed in protecting that privilege by providing *Upjohn* warnings, which bring an employee interview within the scope of the privilege while also enabling a corporation to maintain maximum flexibility in its dealings with government regulators. From the perspective of individual employees, however—those who are often caught in the crosshairs of an investigation and who are most likely to be unlearned in legal matters—the law has placed them at a disadvantage. As the leading cases indicate, even those employees who do not receive adequate *Upjohn* warnings face long odds in protecting their statements from disclosure and convincing a court that those statements were not properly obtained.