The Need for Enhanced Upjohn Warnings after Yates

The importance of the *Upjohn* (or corporate *Miranda*) warning once again has taken center stage in several pending high-profile cases, including the criminal prosecutions of former Penn State University president Graham Spanier and Retrophin, Inc. CEO Martin Shkreli. In both cases, the entities' ability to disclose information revealed during privileged communications with those defendants (and thereby earn the coveted cooperation credit or general goodwill with the government) was impacted by the quality of the *Upjohn* warnings given. Beyond these newsworthy examples, the significance of providing an adequate *Upjohn* warning when conducting employee interviews has been markedly amplified by the new guidelines issued by the U.S. Department of Justice in September 2015 concerning individual accountability for corporate wrongdoing (the Yates Memo).

Under the Yates Memo, a company can only be eligible for cooperation credit if it discloses *all* relevant facts about individuals involved in corporate misconduct. In other words, the government now expects companies to affirmatively serve up their bad actors, and to do so with a full factual disclosure. As a practical matter, this will often entail revealing what a culpable corporate constituent (*i.e.*, an officer, director, employee or shareholder) says during an investigatory interview. But a company can only do this if it retains the right to control the attorney-client privilege, which is the basic function of the *Upjohn* warning. Consequently, in a post-Yates world, a company's ability to preserve its cooperation credit eligibility not only demands a mindful adherence to the customary *Upjohn* warning procedure when conducting corporate interviews, but also an enhanced version of the *Upjohn* warning, which could include:

- Developing a formal script for the *Upjohn* warning;
- Providing the witness with a written summary of the critical points of the warning;
- Requiring a written acknowledgement; and
- Specifying that the company may unilaterally disclose to the government the content of the interview.

THE *UPJOHN* WARNING

One of the most critical aspects of the attorney-client privilege is the ability of the client to control the dissemination of privileged information. Since the Supreme Court's decision in *Upjohn Co. v. United States*, the general rule is that the corporate attorney-client privilege embraces any communication between counsel and a corporate constituent concerning a subject within the scope of their duties for the purpose of providing legal advice to the company.[1] In the ordinary circumstance, the company controls the decision to waive the privilege and disclose the content of the communication to the government. This right is jeopardized if the constituent claims that the company's lawyer also represents him/her, potentially giving rise to a personal attorney-client relationship and the constituent's ability to control the dissemination of what was discussed during the investigatory interview. Although courts apply different tests to determine when a joint representation arises in a company-constituent situation, the prevailing approach tends to weigh in favor of the company by placing the burden on the constituent to affirmatively take steps to establish a personal attorney-client relationship with corporate counsel.[2] Nevertheless, both *Upjohn* and the rules of professional responsibility require corporate counsel to clarify that the nature of the interview is for the purpose of providing legal advice to the company, not the constituent.[3]

[1] 449 U.S. 383, 394-395 (1981).

[2] The majority of the federal circuits have adopted some version of the so-called "*Bevill* test," which provides that corporate constituents seeking to assert a personal claim of attorney-client privilege must affirmatively demonstrate five factors: (1) that they approached counsel for the purpose of

Although the Supreme Court's decision in *Upjohn* did not actually address a warning procedure, its analysis serves as the bedrock for what corporate counsel should generally disclose to constituent witnesses at the outset of an investigatory interview. The customary *Upjohn* warning should normally address the following points:

- The lawyer represents the company only and not the witness personally.
- The lawyer is collecting facts for the purpose of providing legal advice to the company.
- The communication is protected by the attorney-client privilege, which belongs exclusively to the company, not the witness.
- The company may choose to waive the privilege and disclose the communication to a third-party, including the government.
- The communication must be kept confidential, meaning that it cannot be disclosed to any third party other than the witness's counsel.[4]

Once these basic points have been addressed and the witness has been given the opportunity to ask questions, the delivery of the *Upjohn* warning should be memorialized in some way, usually by counsel noting that it was provided in a contemporaneous memorandum summarizing the interview. Of course, the facts of the particular situation or investigation may justify a departure from these general principles.

THE YATES MEMO

The Yates Memo is the product of a perceived failure to prosecute high-level executives responsible for the financial crisis. It marks the first change in more than seven years to the written policies and practices used by the federal government during its investigations and prosecutions of corporations. Not since the memorandum issued by Deputy Attorney General Mark Filip in August 2008 has the Department of Justice revised its approach to handling corporate investigations, and specifically the rules for doling out cooperation credit.[5]

As a brief recap, the Yates Memo "reflects six key steps" that are designed "to strengthen" the government's pursuit of individual corporate wrongdoing:

1. Insist on disclosure of *all* relevant facts about culpable individuals.
2. Focus on corporate actors from the beginning.
3. Regular communications between criminal and civil government attorneys.
4. Absent exceptional circumstances, no liability releases for culpable individuals in corporate resolutions.
5. No corporate resolution absent a plan to resolve individual cases.
6. Consider civil suits against culpable individuals regardless of ability to pay.

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seeking legal advice; (2) that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities; (3) that counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise; (5) that their conversations with counsel were confidential; and (5) that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company. *See United States v. Graf*, 610 F.3d 1148, 1159-1160 (9th Cir. 2010) (citing *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123-125 (3d Cir. 1986)).

[3] *See* Model Rules of Prof'l Conduct, Rule 1.13(f) ("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."), Rule 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

[4] *See, e.g.*, ABA, White Collar Crime Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees* (July 17, 2009).

[5] *See* Mem. of Dep. Att. Gen. Eric Holder (dated June 6, 1999); Mem. of Dep. Att. Gen. Larry Thompson (dated Jan. 20, 2003); Mem. of Dep. Att. Gen. Robert McCallum (dated Oct. 21, 2005); Mem. of Dep. Att. Gen. Paul McNulty (dated July 5, 2007); Mem. of Dep. Att. Gen. Mark Filip (dated Aug. 28, 2008).

Much has been written about the "real world" impact of the Yates Memo. For example, some commentators believe that the guidelines are not particularly novel because the government routinely targets corporate malfeasants. Additionally, Deputy Attorney General Yates has expressly attempted to quell concerns about the potentially explosive new scope and cost of internal investigations: "We are not asking companies to 'boil the ocean'."

Nevertheless, one of the principal takeaways from the Yates Memo is that if a company wants to preserve its eligibility for cooperation credit, it must hand over culpable individuals and do so with full disclosure of "all relevant facts" related to those individuals' participation in the wrongdoing. As Deputy Attorney General Yates has described it, this is an "all or nothing" policy, and companies now have an affirmative duty to root out individual wrongdoing.

THE IMPACT OF THE YATES MEMO ON *UPJOHN* WARNINGS

Even before the Yates Memo, one of the main objectives of any internal corporate investigation is to learn the truth. This is best accomplished through the unfettered disclosure of information by constituents to corporate counsel. But simply learning the truth is not the ultimate endgame. To maximize the utility of the information, it is critical for the company to retain the right to disclose the information to the government. It can only do so if the interview is conducted in a manner that avoids the appearance or perception that a personal attorney-client relationship exists between the constituent and corporate counsel. The principal function of the *Upjohn* warning procedure has always been to avoid this scenario.

In a post-Yates world, the disclosure value of information learned from an investigatory interview with a culpable constituent is enhanced. Now, if the *Upjohn* warning is not adequately delivered, the company runs the risk of losing its cooperation credit eligibility. Given the elevated stakes, this necessarily requires a dogged adherence to the customary *Upjohn* warning procedure when conducting corporate interviews, as well as a consideration of implementing additional or enhanced measures, such as:

- *Uniformity*: develop a formal script for the *Upjohn* warning to be read by corporate counsel to each constituent witness at the outset of the interview.
- *Corroboration*: provide the constituent witness with a written summary of the critical points that accompany the oral warning.
- *Ratification*: require the constituent witness to acknowledge in writing that the *Upjohn* warning has been given and that they understand the scope of the attorney-client privilege; and
- *Yates-Specific*: supplement the standard *Upjohn* warning with a reference to the first directive of the Yates Memo—that the company may to disclose the entirety of the discussion to the government without consulting the witness.

Some might believe that giving an enhanced *Upjohn* warning could diminish the truth-finding function of an internal investigation because it could have a chilling effect on the constituent's candor and lead to more constituents choosing to be represented by their own lawyer—often at company expense. This general concern about the *Upjohn* warning process often has been overblown. Most constituents cooperate with investigations even when it is against their interest to do so because they want to be perceived as a "team player" and avoid the potential for discipline from the company. The psychology underlying constituent cooperation is unlikely to be materially impacted by these enhanced *Upjohn* measures.

The flip side of giving a "watered down" (or non-enhanced) *Upjohn* warning is that the company faces a greater risk of the constituent believing that a personal attorney-client relationship exists, which can lead to the constituent attempting to block the company's disclosure of information revealed during the interview. If successful, this "constituent veto" strategy could not only jeopardize the company's ability to fulfill its duty to disclose "all relevant facts" under the Yates Memo, but also optically align the interests of the individual wrongdoer with the corporation. Department of Justice officials have stated that they will "credit, not penalize, diligent investigations" and confirmed that "a company cannot provide what it does not have." Therefore, on balance, any decrease in the level of constituent cooperation by an enhanced *Upjohn* warning is likely to be outweighed by the increased preservation of cooperation credit eligibility under the new Yates Memo guidelines.

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