The Intersection of Employment Law and Criminal Law

Jo Ann Palchak
The Law Office of Jo Ann Palchak, PA, Tampa, FL

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- Corporate counsel may be faced with the necessity to investigate allegations in the workplace dealing with regulatory or criminal wrongdoing.

- This presentation provides background information on conducting such internal investigations to address the fact pattern put before the panel.

- Many of the best practices in use today for performing internal investigations emerged after the U.S. Supreme Court decided a case entitled ***Upjohn Co. v. U. S., et al* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)**

- This powerpoint will provide a brief overview of the facts and circumstances of *Upjohn* and provide a framework for the panel discussion where best practice, privilege issues, and ethical considerations will be analyzed.

The Internal Investigation

- **Corporate counsel determines an internal investigation is necessary**
- What are the best practices in dealing with employees when there is allegation of wrongdoing?
- Do you hire outside counsel?
- What is privileged? What is covered by the work-product doctrine?
- If so, who gets to assert the privilege?
- What are your ethical duties?
- What are the Upjohn warnings?

Upjohn's "Corporate Miranda" Warning A Brief Overview

- ***Upjohn Co. v. U. S.**, **et al*** **449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)**

- A general counsel of Upjohn, a large pharmaceutical company, learned that a foreign subsidiary had made "questionable payments" to foreign government officials in order to secure government business.

- The general counsel initiated an investigation of the alleged payments by sending a questionnaire to all foreign subsidiary managers about the payments.

- All of the responses were returned to the general counsel.

Upjohn v. U.S.

The investigation and disclosure

- The general counsel and an outside firm interviewed the managers who had filled out the the questionnaires as well as other company officers and employees.

- Upjohn voluntarily submitted a report about the matter, disclosing the questionable payments to the Internal Revenue Service (IRS).

- The IRS initiated an investigation to determine the tax consequences of the alleged payments and issued a summons pursuant to 26 U.S.C. § 762 demanding production of the questionnaires, the memoranda, and notes of the interviews.

Upjohn v. U.S.
Attorney Client Privilege and Work Product Doctrine

- Relying upon the attorney-client and work product privileges, Upjohn refused to produce the documents.
- The government moved to enforce the summons at the district court.
- A Magistrate's heard the matter and recommended: (1) that the attorney-client privilege had been waived and (2) that the government had made a showing of necessity that overcame the work product doctrine.
- The District Court adopted the recommendation.

Upjohn v. U.S. Appeal

- Upjohn appealed.
- The appellate court disagreed with the district court that the attorney-client privilege had been waived, but held that under the so-called "control group test" the attorney-client privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.' "
- The court also held that the work-product doctrine did not apply to IRS summonses

Upjohn v. U.S.

SCOTUS *reverses*

- The Supreme Court reversed and held"
- The communications by Upjohn employees to counsel fell within and were covered by the attorney-client privilege (i.e. responses to the questionnaires, notes related to the responses and the interview questions)
  - Control group had been construed too narrowly below
- The work-product doctrine applied to the IRS summonses
  - A tax summons is subject to the traditional privileges and limitations the statute is silent to preclude application of work-product doctrine

Who does the privilege belong to?

- Since the privilege applies – who does it belong to? The company or the employee?
- What if the corporation is the target of a federal or state investigation and the Corporation wants to mitigate its exposure by demonstrating any corporate governance steps already taken (like an investigation)
- Corporations often take the path of a deferred prosecution agreement which often requires turning over any such findings or notes.A corporation may choose to waive the attorney-client privilege over the interviews and produce statements made by employee/constituents to corporate counsel during the internal investigation.
- **But what about the perception of the attorney client privilege by the employee?** Upjohn warnings have emerged a way to put the employees on notice that the corporation alone has the privilege and it's the corporation who will decide to waive the privilege or not

It is important to warn the employee

- If the person conducting the interview doesn't warn the employee properly, the employee may attempt to assert that an attorney-client relationship was established during the interview and that they (the employee) hold the privilege
- If so, the employee may then assert that, as privilege holders, they do not elect to waive the privilege and cooperate with the government by permitting their statements to the attorney to be produced.

“Corporate Miranda” Warnings

- I am a lawyer for Corporation X.
- I represent only Corporation X.
- I am not your lawyer and I do not represent you personally.
- This interview is part of an investigation find out about certain circumstance at Corporation X
- I am conducting this interview to learn facts to enable me to provide legal advice to Corporation X.

Key Components the *Upjohn* Warning

- Whatever we discuss is protected by the attorney-client privilege.
- However the attorney-client privilege belongs only to Corporation X, not you.
- That means that Corporation X at its sole discretion may decide to waive this privilege and share it with third parties such as federal or state agencies without notifying you.
- In order for the attorney-client privilege to apply to this conversation, it must be kept in confidence.

Key Components the *Upjohn* Warning

- You may, of course, share this conversation with your own attorney, but you cannot disclose the substance of our interview with any other third party for the privilege to remain intact including other employees or anyone outside of the company.
- You may discuss the facts of what happened but you may not discuss *this interview*.
- Do you have any questions?

Upjohn Warning Best Practice

- Counsel should provide the warning before any interview or discussion with the employee is conducted.
- Next, counsel should write out the warnings in advance and adhere very closely to their prepared warnings.
- Counsel can simply discuss the warnings but should use the written outline to make sure that the warnings are consistent and accurate for all employees being interviewed.
- Last, counsel should memorialize that the warnings were given by making a handwritten and/or memo that the warnings were put in place and that the employee agreed to be interviewed.

Ethical Issues
Notice is Necessary

- **ABA Model Rules of Professional Conduct R. 1.13. Organization as Client**
- (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."

Ethical Issues

- **ABA Model Rules of Professional Conduct R. 1.13. Organization as Client**
- **Comment 10:** There are times when the organization's interest may be or become adverse to those of one or more of its constituents.
- In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.
- 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 representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged

Resources

- ***Upjohn Co. v. U. S., et al* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)**
- White Collar Crime Committee of the American Bar Association's Criminal Justice Section whitepaper.
- **"UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES"**