

Attorney-Client Privilege and Internal Investigations

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Two cases illustrate some of the problems with the use of outside counsel for internal investigations. The possibility that a conflict of interest could arise when an attorney or law firm simultaneously represents an organization and one or more of its officers or directors is a recurring issue.

A ruling earlier this month by [U.S. District Judge Cormac Carney](#) made a stark warning to lawyers that they need to warn a company's employees in internal company investigations that they represent the company, not the employee. Judge Carney dismissed portions of the government's criminal case against William J. Ruehle, the former CFO of Broadcom Corp. after finding that the law firm hired by Broadcom to review possibly illegal stock-option grants failed to explain clearly to the executive that it wasn't representing him. [Irell & Manella](#) was involved in three separate but related representation of Broadcom and Mr. Ruehle.

Judge Carney ruled that Mr. Ruehle's statements are privileged because he "reasonably believed that the lawyers were meeting with him as his personal lawyers, not just Broadcom's lawyers. Mr. Ruehle has a reasonable expectation that whatever he said to the Irell lawyers would be maintained in confidence."

Judge Carney mentioned an *Upjohn* warning or "corporate miranda" to inform a constituent member or an organization that the attorney represent the organization and not the constituent member. The Judge ruled that the *Upjohn* warning would not be sufficient because Mr. Ruehle was already a client of Irell. The judge threw the statements of Mr. Ruehle out of evidence and also referred the law firm to the California state bar for disciplinary action.

A similar issue recently arose during the government investigation of R. Allen Stanford. Proskauer Rose lawyer Thomas Sjoblom accompanied Stanford Financial Group' Chief Investment Officer Laura Pendergest-Holt to an SEC investigation. According to the Wall Street Journal, he said during the testimony that he represented Mr. Stanford and officers and directors of his affiliated entities. Ms. Pendergest-Holt believed he was representing her. She got indicted and is now suing Sjoblom for malpractice. She alleges that Sjoblom caused her to speak to the SEC without informing her of her Fifth Amendment rights against self-incrimination, that she was not required to testify, that she had no attorney-client privilege with him and that the interests of her employer were adverse to her interests

If you hire an outside law firm as part of an investigation, you need to make it clear that the lawyers represent the company and not the employee or executive. The lawyers need to be clear as well since they are likely to be subject to an ethics complaint or malpractice suit if they are not clear.

See:

- [For Corporate Lawyers, There's Just One Client](#) by Kara Scannell for the Wall Street Journal
- [Judge Carney's Broadcom Ruling Grabs Attention of White Collar Bar](#) by Bruce Carton for Securities Docket
- [A Case of Divided Loyalties](#) by Kevin M. LaCroix of The D&O Diary
- [Miranda Warnings for Lawyers? Recent Rulings Highlight the Possibility](#) by Ashby Jones of the WSJ Law Blog
- [Order Suppressing Privileged Communications in US V. Nichols and Ruehle](#) (Broadcomm case) - Hosted on JD Supra
- [Upjohn Co. v. United States, 449 U.S. 383 \(1981\)](#)

Tags: [attorney-client privilege](#), [Broadcom](#), [internal investigations](#)

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2 RESPONSES TO "ATTORNEY-CLIENT PRIVILEGE AND INTERNAL INVESTIGATIONS"

1. [Corporate Miranda for Internal Company Investigations | Compliance Building](#)

[April 16, 2009 at 12:00 pm \(Edit\)](#)

[...] As in-house counsel are often the ones starting an internal investigation, they need to be mindful of the same issues that appear when outside counsel are conducting an internal investigation. I wrote about the referral for discipline in the Ruehle case and the malpractice claim in Pendergast-Holt investigation in Attorney-Client Privilege and Internal Investigations. [...]

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2. [ONSITE3 \(ONSITE3\)](#)

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