Sandusky Meets Upjohn: A Reminder To In House Counsel

Companies facing a crisis often turn to in house counsel to investigate the facts that precipitated the crisis. In house counsel's first step often is to interview corporate employees with knowledge of those facts. Experienced in house counsel know that at the outset of the interview they must provide the corporate employee with what is commonly referenced as "*Upjohn* warnings." As evidenced by recent judicial decisions, including three stemming from the sordid Sandusky affair, in house counsel's failure to provide such warnings can have significant consequences.[1]

The purposes of this alert are to remind in house counsel of the importance of giving proper *Upjohn* warnings to company employees and to provide recommendations when doing so.

A company's lawyer owes his or her professional duties to the company, not to the entity's employees. The attorney-client privilege belongs to the company, not to any employee. However, employees who are interviewed by company counsel, or who interact with company counsel in other ways, particularly in the "heat of battle" when the company faces a crisis, understandably may believe that company counsel represents the employees' interests as well. Thus, it is critical that in house counsel, at the outset of an interview, provide the employee with a proper *Upjohn* warning.

Penn State Cases

Most of us are familiar with the Sandusky child abuse tragedy. Criminal charges were brought against Sandusky and numerous other individuals, including three former administrators of The Pennsylvania State University: Gary Schultz, Graham Spanier, and Timothy Curley (the "Administrators")[2]. The Administrators were charged with multiple criminal offenses. The offenses were based on: (1) their mishandling of allegations of sexual misconduct against Sandusky, the former defensive coordinator for the Penn State football team; (2) their testimony before the grand jury; and (3) the grand jury testimony of Cynthia Baldwin, Penn State's general counsel, who testified to admissions the Administrators made to her. This third basis for the charges against the Administrators is the focus of this alert.

Before Baldwin testified before the grand jury, each of the Administrators also testified before the grand jury. Baldwin had appeared with each Administrator while he testified. Not surprisingly, each Administrator thought Baldwin was his lawyer for purposes of his grand jury testimony.[3] Thus, it came as a shock to the Administrators when Baldwin later disclosed her communications with them to the grand jury.[4]

Baldwin denied that she represented the Administrators. She later tried to justify her conduct. For example, as to one of the Administrators, she stated that she:

> [E]xplained to [Curley] that I could go in [to the grand jury room], but I was general counsel for Penn State, that there was no confidentiality. And I emphasized that there was no confidentiality. . . . [T]here was no confidentiality between Mr. Curley and me because I was the university's attorney. So what he told me wasn't going to be confidential . . . . I mean, if the board asked, I would tell them."

Curley, 2016 WL 285707 at *2 (quoting N.T. Curley Hearing, 11/20/14, at 93).

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During the Administrators' criminal proceedings, each of the Administrators filed pre-trial motions to preclude the introduction of Baldwin's testimony and to quash certain criminal charges based on violations of the attorney-client privilege.

On January 22, 2016, the Pennsylvania Superior Court granted the Administrators' motions. The Court analyzed *Upjohn Co. v. United States*, 449 U.S. 383 (1981):

> Although *Upjohn* itself did not involve warnings or a discussion of a lawyer's explanation regarding the scope of his representation, the [United States] Supreme Court observed that, under certain situations, information about the extent of the attorney-client relationship between a corporate counsel and an employee might be necessary. As a result of that case, "*Upjohn* warnings" have evolved that specifically inform a corporate employee that corporate counsel represents the corporation and not the individual, and that the corporation possesses the attorney-client privilege.

Schultz, 2016 WL 285506, at *14; *see also Spanier*, 2016 WL 285663, at *11 (same); *Curley*, 2016 WL 285707, at *9 (same).

Significantly, the Court determined that "Baldwin did not provide anything akin to *Upjohn* warnings." *Schultz*, 2016 WL 285506, at *25. The Court concluded that Baldwin did not explain the difference between her representation of the Administrators in their individual capacities and as agents of Penn State. As a result, the Court found the Administrators did not know that Baldwin did not represent them in their individual capacities; thus, the Court concluded, they constructively lacked counsel when they testified before the grand jury.

The Court also found that because the Administrators reasonably believed that Baldwin represented them, and because Baldwin failed to give them adequate *Upjohn* warnings, all communications between the Administrators and Baldwin were protected by the attorney-client privilege. "Consequently, Ms. Baldwin breached that privilege by testifying before the grand jury with respect to such communications." *Schultz*, 2016 WL 285506, at *25.

As a result of Baldwin's failure to give *Upjohn* warnings, the Superior Court dismissed many of the criminal counts against the Administrators.[5]

Best Practices For In House Counsel

Before interviewing a company's employee in the context of an investigation, in house counsel must give the employee a proper *Upjohn* warning. An *Upjohn* warning specifically informs the company's employee that the lawyer represents the company and not the individual, and that the attorney-client privilege belongs to the company, which can waive the privilege and disclose the communications.

The American Bar Association suggests that counsel give the following *Upjohn* warning to a company's employee:

> I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.
>
> . . .

> Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

ABA WCCC Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* (PDF) (July 17, 2009), available at **https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf**.

We urge in house counsel to err on the side of caution or seek outside guidance when faced with questions relating to the scope of the lawyer's representation of company employees. The authors of this alert know from their own experience conducting internal investigations and advising clients on proper investigative techniques that there is tension between, on the one hand, in house counsel's desire to obtain information from company employees, but on the other hand, the obligation of company counsel to provide proper *Upjohn* warnings, which may cause the employee to refuse to cooperate or to demand his or her own counsel. That tension should be resolved in favor of a proper and complete *Upjohn* warning. Moreover, it is difficult to imagine a situation where in house counsel should interview (much less purport to represent) a company employee regarding a grand jury subpoena or an obviously criminal matter, even where a proper *Upjohn* warning is given, unless the employee has his or her own counsel present.

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[1] The cases are titled *Commonwealth v. Schultz*, No. 280 MDA 2015, 2016 WL 285506 (Pa. Super. Ct. Jan. 22, 2016), *Commonwealth v. Curley*, No. 299 MDA 2015, 2016 WL 285707 (Pa. Super. Ct. Jan. 22, 2016), and *Commonwealth v. Spanier*, No. 304 MDA 2015, 2016 WL 285663 (Pa. Super. Ct. Jan. 22, 2016).

[2] Schultz is a retired Senior Vice President for Finance and Business for Penn State, Spanier is the former President of Penn State, and Curley is the former Athletic Director of Penn State.

[3] All three Administrators were charged with two counts of endangering the welfare of a child ("EWOC") and one count each of perjury, failure to report suspected child abuse, obstruction of justice, and conspiracy.

[4] It is noteworthy that Baldwin also failed to advise the Administrators of their Fifth Amendment rights before they testified before the grand jury.

[5] The Superior Court quashed the obstruction of justice and conspiracy charges against Curley, and quashed the perjury, obstruction of justice, and conspiracy charges against Schultz and Spanier. All three Administrators remain charged with failure to report suspected abuse and endangering the welfare of children. Curley also remains charged with perjury.

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