BNA's

Corporate Counsel Weekly

CORPORATE PRACTICE SERIES

VOL. 24, NO. 22 JUNE 10, 2009

 ISSN 0886-0475

Analysis
Internal Investigations

'United States v. Nicholas': Expanding the 'Upjohn' Suppression Remedy

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A 19-page suppression order recently issued by the U.S. District Court for the Central District of California in *United States v. Nicholas* [1] has injected even more Hollywood drama into the headline-grabbing prosecution of several former Broadcom Corp. executives for alleged stock-options backdating.[2]

The suppression order (the ''Order'') confirms and expounds upon a bench decision issued Feb. 25, 2009, at the conclusion of a three-day evidentiary hearing. The purpose of the hearing was to determine whether statements made by former Broadcom Chief Financial Officer William J. Ruehle to attorneys at the law firm of Irell & Manella LLP (''Irell'') were covered by Ruehle's personal attorney-client privilege and whether Irell should have disclosed such statements to Ernst & Young and the U.S. Attorney's Office on Broadcom's behalf.

The court held that even though Irell was not technically representing Ruehle, Ruehle's statements to Irell were nonetheless protected by the attorney-client privilege and were disclosed without his consent. Therefore, Ruehle's statements, memorialized in various documents, must be suppressed. The Order is consistent with an earlier protective order issued by a special master in the ongoing civil derivative litigation involving Broadcom.[3] The Order goes further than the protective order, however, in that it expresses doubt that Ruehle ever received an *Upjohn* warning, finds three ''clear violations'' of ethical rules by the Irell lawyers, and announces the court's intention to refer the Irell lawyers to California Bar Counsel for ''appropriate discipline.''

Strategy Was Threefold

Ruehle's strategy in meeting his burden of proving that a personal privilege attached to his communications with corporate counsel was threefold. At the hearing, he (1) denied that he received an *Upjohn* warning, (2) attacked the substance of the *Upjohn* warning that Irell contends that it gave, and (3) painted a detailed picture of Irell's extensive history of representing him (individually) and Broadcom.

The *Nicholas* ruling is notable for a variety of reasons, including its potential to significantly impact the way investigatory counsel approaches internal investigations going forward. At a minimum, the Order counsels defense practitioners to scrutinize the content and method of delivery (oral versus written) of their typical *Upjohn* warning and to consider the need for a written conflicts waiver at the outset of every investigatory interview.

Legal and Factual Underpinnings

General Legal Principles at Play in 'Nicholas.' By way of background, *Upjohn* warnings derive their name from the seminal case of *Upjohn v. United States*, 449 U.S. 383, 391–92 (1981), which established that the corporate attorney-client privilege applies to a wider group of corporate constituents than just the corporation's control group. The purpose of *Upjohn* warnings, occasionally also called ''corporate *Miranda* warnings,'' is to clarify that corporate counsel represents the corporation (here, Broadcom) rather than the constituent (here, Ruehle) and to explain the contours of the corporate attorney-client privilege to the constituent. The corporate attorney-client privilege belongs solely to the corporation, and the corporate entity has full discretion to waive or assert its privilege.

High-Ranking Executives Complicate Matters. Most lawyers will agree that the concept of the organizational client can be complicated for at least

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[1] United States v. Nicholas, Docket No. 338, Case No. 8:08-00139 (C.D. Cal. April 1, 2009) (order suppressing privileged communications).

[2] The case has garnered national attention in part because of the high-profile and notorious reputation of Broadcom cofounder Henry Nicholas. Nicholas was also recently charged with drug trafficking offenses. His legal battles and his alleged personal struggles have been widely reported in the popular press. *See, e.g.*, Bethany McLean, *Dr. Nicholas and Mr. Hyde: Sex, Lies, and Underground Lairs*, VANITY FAIR, November 2008, *available at* http://www.vanityfair.com/politics/features/2008/11/nicholas200811?currentPage=1.

[3] *In re* Broadcom Corp. Derivative Litig., Docket No. 272, Case No. 2:06-cv-03252 (C.D. Cal. Jan. 9, 2009).

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  CCW ISSN 0886-0475

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some corporate constituents. The *Nicholas* ruling suggests that very high-ranking employees might find this conceptually more difficult than lower-level employees because the former are more likely to have past litigation experience in which they were represented personally by the company's lawyer. The outcome in *Nicholas* may signify that high-level employees who challenge the adequacy or the existence of *Upjohn* warnings in the future may be given increased deference because of, rather than in spite of, their sophistication.[4]

Firm's Ties to Corporation, Executive. It is hard to overstate the impact of Irell's relationships (past *and* present) with Ruehle and Broadcom on the court's analysis. In 1997, Irell purchased 225,000 pre-initial public offering shares of Broadcom stock. The sale of stock to Irell is described in the first footnote of the Order, revealing, perhaps, a belief by the court that Irell was predisposed for financial reasons to favor Broadcom over Ruehle in any conflict of loyalties.

Irell's prior representations of Broadcom and Ruehle covered multiple areas of the law and spanned several years. Relative to this case, there were three key representations. All three representations focused on Broadcom's historical stock-option granting practices. The Order finds that there was a brief period in which Irell represented both Broadcom and Ruehle personally in two of those matters. The third was an internal investigation, termed an ''equity review'' by Irell and the government, in which Irell represented Broadcom's audit committee in investigating Broadcom's accounting for option grants. At least one of the two Irell partners involved in the equity review also appears to have had responsibilities in the two options-related cases that Irell was handling for Broadcom and Ruehle.[5] The court suppressed documents reflecting statements that Ruehle made to the two Irell partners handling the equity review concerning stock-option granting practices. Irell disclosed the statements to Ernst & Young in August 2006, and then to the government in 2007 and 2009.

Irell and the government contended that Ruehle made the statements in connection with the equity review; thus, they should be viewed under a different lens consistent with Ruehle's understanding of that engagement.[6] The court ignored this distinction and focused on the similar facts underlying all three representations.

Alleged 'Upjohn' Warning 'Woefully Inadequate.' The court expressed ''serious doubt[ ]'' that any *Upjohn* warning was given and called the warning that Irell testified to ''woefully inadequate under the circumstances.'' [7] Irell testified that it gave the following *Upjohn* warning:

> A: I mentioned in the *Upjohn* or civil *Miranda* warning that I gave to Mr. Ruehle at the outset of the first sort of fact or process interview that we met with him, that it was a possibility that there could be administrative investigations that arose out of this, and that in that instance, it would be a company privilege and it would not be his privilege. * * * *
>
> Q: Did you explain to him that companies often waive the privilege in government investigations and are asked to summarize the details of interviews with employees?
>
> A: No, but I told him that sometimes companies do take the position that they're going to cooperate with the government entities, and in that instance he would not have the privilege.[8]

The court found Irell's alleged warning deficient in three respects.[9] First, and ''most importantly,'' the court found that Irell failed to explain that Ruehle's statements could be shared with third parties, including the government in a *criminal investigation*. Second, the court found that the Irell lawyers failed to explain that they were not Ruehle's counsel, at least for purposes of the equity review. Third, the court found that Irell failed to advise Ruehle that he should consult with another lawyer.[10]

Reasonable Belief in Existing Attorney-Client Privilege. As is common, the *Nicholas* court applied a reasonable belief standard in evaluating Ruehle's claim that he believed he was consulting Irell as his personal counsel.[11] In determining whether Ruehle's stated expectations were reasonable, the court's focus on ''all kinds of indirect evidence and contextual considerations'' [12] allowed it to find a personal privilege where others have not. The result in *Nicholas* will likely embolden similarly situated defendants across the country. Accordingly, counsel must understand the implication of *Nicholas* for corporate investigations going forward.

Implication of 'Nicholas'

In ruling from the bench, the court opined that it was not a good day for justice and acknowledged two obvious problems flowing from the suppression remedy—the government's inability to use the evidence against Ruehle and other Broadcom executives and the corresponding devaluation of Broadcom's cooperation in the eyes of the government.

On the bright side for defense counsel, greater attention on the suppression remedy may create a disincentive for the government to seek privilege waivers and for corporations to feel the need to waive privilege in order to receive cooperation credit. In short, *Nicholas* may make fact-based proffers more attractive to the government going forward.

A less obvious consequence stemming from *Nicholas* is defense counsel's increased liability risk arising from a corporate employee's misimpression that the attorney was representing the employee or that there was a ''communicator's privilege.'' Although not well established, these types of claims may become increas-

[4] *See generally* United States v. Nicholas, Order at 10 (''Mr. Ruehle was an experienced corporate officer and had substantial prior experience with civil litigation. . . . [H]e would never have agreed to provide information that Irell could then turnover [sic] to the Government . . . .'').

[5] United States v. Nicholas, transcript of evidentiary hearing, Vol. 2 at 21 (Feb. 23, 2009).

[6] As a member of the audit committee, Ruehle took part in discussions about the scope of the equity review. Irell testified that the audit committee was clearly informed that officers would need separate counsel if issues of self-dealing or management integrity arose during the equity review.

[7] United States v. Nicholas, Order at 11 (absence of written record of warning fueled court's skepticism that one was provided).

[8] United States v. Nicholas, evidentiary hearing at 50 (Feb. 23, 2009).

[9] United States v. Nicholas, Order at 11–12. The court's holding turned not on the perceived deficiencies, but on its view that not even a model *Upjohn* warning would have allowed Irell to sever its attorney-client relationship with Ruehle for the equity review. In fact, the court found that only a written conflicts waiver by Ruehle in respect of Broadcom would have allowed Irell to proceed in disclosing Ruehle's communications.

[10] United States v. Nicholas, Order at 11–12.

[11] *Id.* at 7.

[12] *Id.* at 8.

ingly common in the wake of *Nicholas*.[13]

How the law will develop in this area in the future is unclear. What is certain is that the stakes are becoming increasingly higher for everyone involved in the internal investigations process. Attorneys conducting the interview would do well to re-evaluate their warnings to witnesses in light of *Nicholas*.

Practical Lessons

What constitutes an appropriate *Upjohn* warning in any given case will depend upon the facts and circumstances. Nevertheless, there are basic principles to keep in mind at all times before, during, and after the interview.

■ Have more than one lawyer present during the witness interview.

■ Mention the issuance of the warning in the contemporaneous notes summarizing the interview.

■ Reduce the warning to a ''script'' and read it verbatim to the witness. Append the script to a typed interview summary (preferable) or to handwritten interview notes.

■ Consider furnishing the script to the witness for him or her to sign. The desirability of this may depend upon the stature and role of the witness and whether he or she has questions about the oral warning.

Contents of the Warning

In 2008, the ABA's White Collar Crime Committee formed a task force to recommend best practices when providing *Upjohn* warnings. The task force is expected to make a final report later this year. However, the current draft of the recommended best practices includes this suggested *Upjohn* warning:

> I am a lawyer from Corporation A. I represent only Corporation A, and I do not represent you. I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed. 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.
>
> In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss[ ] *this* discussion.
>
> Do you have any questions?
>
> Are you willing to proceed?

In many cases, this form of warning should be sufficient to apprise employees of the scope and application of the attorney-client privilege.

Additionally, prior to conducting interviews, it is good practice to attempt to determine which employees' interests are likely to diverge from those of the company and which employees have criminal exposure. Once that determination is made, counsel should consider whether to advise those employees that they have a right to separate counsel and that their statements can be used against them. Although *Upjohn* warnings typically focus on preserving the integrity of the attorney-client relationship and the confidentiality of the communications, they can also be used to warn against self-incrimination. Following *Nicholas*, counsel may want to address self-incrimination as a matter of routine and certainly in cases where the employee might have criminal exposure.

Dual-Representation Situations

Attorneys who represent both the company and its employees should always be diligent about creating a record that clearly distinguishes what work is performed for each client.

In sum, while there is no ''one size fits all'' *Upjohn* warning, the foregoing tips should help counsel devise an appropriate strategy in each case.

[13] As an example, Stanford Financial Group's chief investment officer, Laura Pendergest-Holt, recently filed a lawsuit against Stanford's outside counsel after she was criminally charged with obstruction of justice for statements she made to the SEC in his presence. Among other things, Pendergest-Holt claims that counsel never advised that she needed separate counsel for her SEC testimony or that her communications with him were not protected by the attorney-client privilege. *See* Pendergest-Holt v. Sjoblom, No. 3:09-cv-00578, Compl., Docket No. 3 (N.D. Tex.).

CCW ISSN 0886-0475