



The Importance of an Effective *Upjohn* Warning

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In conducting internal investigations for corporate clients, counsel must navigate the difficult terrain of interviewing company employees whose interests may diverge from the company's interests. This presents a number of unique and complex ethical and practical considerations. One of the most pressing considerations is ensuring that counsel makes clear exactly who they represent—and who they do not—when conducting internal interviews. Counsel ought to do this by providing employees an effective *Upjohn* warning.

1. TYPICAL ELEMENTS OF AN EFFECTIVE *UPJOHN* WARNING

- Counsel represents the company in the matter(s) under investigation.
- Counsel *does not* represent the interviewee.
- The interview is privileged and confidential.
- This privilege, however, belongs to the company, *not* to the interviewee.
- Accordingly, the company may decide to waive privilege, and reveal what was said during the interview to third parties.
 - **NOTE:** If the company intends to share the interviewee's statement with the government, the interviewee should be so informed. The government has alleged in some instances, and some courts have found, that lying to counsel in such instances may constitute obstruction of justice.
- The interviewee should treat the interview as confidential, and not share what is discussed with anyone.

Every investigation is different—**there is no "one size fits all" *Upjohn* warning**. Counsel must be attuned to the facts and circumstances of the matter in order to provide a proper warning. If in doubt, seek advice.

2. MECHANICS OF AN EFFECTIVE *UPJOHN* WARNING

- Provide the warning *before* commencing the interview.
- Ensure the interviewee *understands* the warning.
- *Ask* if the interviewee has any questions about the warning.
- Create a *written record* that the warning was discussed with the interviewee.

Why an Effective *Upjohn* Warning Matters

Providing an effective *Upjohn* warning helps counsel to:

- Avoid ethical issues:
 - ABA Model Rules 1.13(f) and 4.3 require attorneys to explain their role as corporate counsel if the interviewee's interests may be adverse to the company, or if the interviewee may misunderstand the attorney's role.
 - Conflicts: If the interviewee reasonably believes company counsel is her lawyer, this may create an implied attorney-client relationship.
- Avoid privilege issues:
 - An effective *Upjohn* warning helps to protect against a claim that the interviewee holds the privilege over their statements to counsel.
- Keep the interview confidential:
 - Explaining that the conversation is privileged, even if it is the company's privilege, encourages interviewees to keep the interview confidential.

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