

Whose Lawyer Is it Anyway: Understanding the *Upjohn* Warning in Health Care Compliance Investigations



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Health care organizations, whether they are hospital and health systems, physician organizations, or the myriad other participants in the industry, are regularly faced with complex investigatory needs that require outside counsel participation or direction. Independent legal counsel is often best equipped to objectively and efficiently handle internal investigations and compliance risk assessments, especially when such inquiries center around any type of so-called whistleblower activity, allegations of criminal conduct, or False Claims Act risks. In addition to getting to the bottom of the real facts, such internal investigations allow the organization to take corrective measures in a timely manner. They also allow the organization to maintain the attorney-client privilege to help control the timing of any self-disclosures of underlying legal issues. During internal investigations, the most valuable information is often gleaned from interviews with the organization's employees, due to their unique knowledge of the inner workings of their company. This is especially the case within the highly regulated health care industry where most organizational structures contain several levels of hierarchy and the employees working within each level have specialized knowledge of their unit or division. Sometimes compliance staff at an organization will be asked to participate in or take an interview on behalf of legal counsel. These recommendations apply equally to such interviews.¹

The quality and extent of the information learned by outside counsel during an internal investigation depends largely on how candid employees feel that they can be with counsel in interviews. While it is important for counsel to receive complete answers from interviewees in order to uncover any wrongdoing or regulatory non-compliance risk, such candor requires that both parties

maintain a certain level of trust with each other. It is critical that the interviewers not misrepresent or overstep their roles and obligations as they attempt to get the interviewee to open up. Counsel be they inside or outside the organization must inform the organization's employee being interviewed that the lawyer represents *only the company and not the employee* individually. After an employee is warned of this, the employee can, potentially, lose some trust in the interviewer (as the employee realizes that their statements are protected by an attorney-client privilege held not by them individually, but by their employer). Consequently, interviewing attorneys must learn through practice to balance the necessity of giving a sufficiently thorough warning while maintaining an open rapport with individual employees of their client.

BACKGROUND

Before providing ideas on how to build trust in an employee interview during a client's internal investigation, it is first important to fully understand the attorney-client privilege and *Upjohn* doctrine and how they work.

The attorney-client privilege is a cornerstone privilege within the United States legal system, ensuring confidential communication between a client seeking legal counsel and the attorney providing legal advice. This privilege is meant to allow both parties to communicate freely and openly during the term of their relationship. While there are exceptions to the attorney-client privilege, it is nonetheless one of the oldest and strongest recognized privileges. Generally, the following elements must be found to establish the existence of the attorney-client privilege and obtain its protection:

- A communication has occurred, including written, oral, and electronic communications;

- The communication was made by an asserted holder who is or seeks to be a lawyer's client to the lawyer themselves;
- No third party is present during the communication made in a setting of confidence; and
- The communication was made for the purpose of providing, obtaining, or seeking legal advice.

While establishing an attorney-client relationship with an individual client is relatively straightforward, the privilege, and specifically the issue of who holds the privilege, becomes more complicated when dealing with complex organizational clients such as health systems. Although we often think of employees as one and the same as the entity for which they work, the two are separable by a principal-agent relationship. Indeed, the attorney-client privilege case law reflects this separation and simultaneously acknowledges the essential role employees play in the continued operations of a business.

The primary source of law acknowledging this unique relationship is widely known as the *Upjohn* doctrine.² The *Upjohn* doctrine, stemming from a 1981 Supreme Court case, declares that responses given by employees relating to matters within the scope of their corporate duties during internal investigation interviews led by outside counsel are protected by the attorney-client privilege between their employer and the employer's lawyers. *Upjohn* also makes clear that the ultimate and sole holder of the privilege is the company, not the individual employee responding to outside counsel's questions. Thus, only the company may choose to waive the privilege and disclose files relating to the investigation, including notes from employee interviews, to any third party such as the government. In this vein, the organization's employees are bound to the privilege just as are the attorneys leading the investigation.

THE *UPJOHN* WARNING

Upjohn clarified the application of attorney-client privilege within corporate settings. Since the Supreme Court's decision, lawyers have been expected to give notice to employees about the nature of their communications in the context of an investigation, known as the *Upjohn* warning. This warning often takes the form of a statement read by lawyers at the beginning of an employee interview, and helps employees understand their rights and obligations during the internal investigation (some lawyers recommend requiring the employee to sign a certificate that they understand and agree to the limitations). The warning protects the client organization's interests and maintains transparency about the boundaries of the attorney-client relationship. Although the *Upjohn* warning is given in all varieties of corporate internal investigations today, the warning finds its roots in the health care industry. The *Upjohn* case itself involved a pharmaceutical manufacturer who had initiated an internal investigation in response to possible financial wrongdoing. This makes the warning all the more pertinent to the complex regulatory compliance risk assessments, fraud and abuse audits, and other internal investigations unique to the health care industry.

In order to best protect the organizational client's interests and satisfy the lawyer's ethical obligations, an *Upjohn* warning given prior to commencing an interview must be thorough and understood by the employee. The notice should inform the employee of the following points:

- The attorney has been engaged by the health care entity to lead a privileged interview as part of an internal investigation into potential wrongdoing;
- The attorney has been hired by the health care organization as outside counsel and thus represents the organization, not the individual interviewee;
- The organization is the sole holder of attorney-client privilege with the engaged counsel; and

- The organization retains sole authority to waive attorney-client privilege, meaning that it maintains discretionary authority to disclose all information learned during the investigation to third parties such as the government.

While it is extremely important that the *Upjohn* warning be given to and understood by the interviewee, the formality of the warning is likely to intimidate the employee, making them less trusting and forthcoming with the organization's attorney. This unease is only compounded by the fact that anything the employee says exposes them to potential liability in the case that the organization does waive attorney-client privilege. It is nonetheless important for an interviewing attorney to proactively mitigate the resulting tension and stress so that the investigation may yield the most complete information and results. This can be done in several ways, all centered around building a rapport with the individual employee while balancing ethical obligations to the client.

PRACTICAL TIPS AND TRICKS FOR CLEARLY ESTABLISHING BOUNDARIES OF REPRESENTATION WHILE MAINTAINING TRUST

Attorneys engaged by a client to conduct an internal investigation, especially one that may uncover criminal wrongdoing as is often the case with health care entities, must play a delicate balancing game in order to stay true to their client's best interests while not losing out on valuable information.

First, an attorney meeting an interviewee should thoroughly introduce themselves to the interviewee, tell them who they work for and how they can be contacted in the future should the interviewee wish to clarify their statements or remember additional facts. In the old days, this was done by handing over a business card, but in today's technology-driven society it can be accomplished in

a myriad of ways. Additionally, telling the interviewee to contact the lawyer if they feel they are being retaliated against for participating in the investigation is a great way to build trust and confidence.

Second, an attorney administering the *Upjohn* warning must recognize that an employee's reaction to receiving the warning will largely depend on the confidence that they have in their employer, something over which outside counsel has no control. Even if the employee lacks confidence in the health care organization, resulting in increased anxiety going into the interview, this can be overcome by building the employee's confidence in the legal counsel. The attorney must emphasize that their role is to zealously represent the client organization and to gather all the information necessary to do so, so that in the case wrongdoing is uncovered, corrective action can be taken rapidly to mitigate the risk of a government investigation. An interviewing attorney should also highlight that internal resolution of the issue is the goal of an investigation, so that an interviewed employee may feel a greater sense of confidence that the company is trying to behave responsibly and ethically. In doing this, the attorney must be careful not to create a false expectation that the entire results of the investigation will be shared with the interviewee.

Additionally, an interviewing attorney should follow the *Upjohn* warning with clear communication to the employee that they have administered this warning in an effort to be as ethical and honest as possible. The interviewer should focus the employee's attention on the idea that the *Upjohn* warning is given to avoid misleading the employee. This way, the employee knows from the beginning of the interview that the company does have the employee's interests in mind to the extent that is possible. Thus, the employee is more likely to trust outside counsel and

be more candid in their responses to the interviewer.

Interviewing attorneys should also stress that any communication by the employee to the attorney is confidential, while making sure that the employee understands the limit of this confidentiality. Although the attorney cannot guarantee that information shared by the employee will remain confidential, an interviewing attorney may want to point out that an employee should have enough confidence in their employer to make the best decision from the results of an internal investigation. The best decision may be uncertain at the time of the interview, but until a decision has been made (and even once it is made in some situations), any information shared by the employee is confidential and privileged.

Finally, an interviewing attorney should not discount the importance of coming across as non-confrontational as possible. Body language matters. While the stakes of a health care-related internal investigation may be high, it is unnecessary to exacerbate the tension felt by everyone in the organization by positioning legal counsel as an adversary. Even the smallest of changes in body language and tone can make an enormous difference in how outside counsel is perceived by an interviewed employee, which may cause an employee to be more or less candid in their responses.

CONCLUSION

The ability to juggle the necessity of an in-depth *Upjohn* warning with the desire to learn as much information as possible from those who possess knowledge relevant to a company's internal investigation is a learned and valuable skill. The points above are key to maintaining a rapport with interviewees that will, in turn, allow legal counsel to zealously represent and advise their health care entity client.

Endnotes

1. See Neuberger M., Pamperin K., Vernaglia L.,
“Working with Experts: Understanding the Attorney-
Client Privilege and Work Product Doctrines in
Health Care Investigations and Other Assignments,”
Journal of Health Care Compliance, vol. 24, no. 5
(September-October 2022).
2. *Upjohn Co. v. United States*, 449 U. S. 383, 394.

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