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## Ninth Circuit Holds That Absence Of "Upjohn Warning" Does Not Bar Admissibility In Criminal Prosecution Of Statements Elicited By Corporate Counsel During Internal Investigation

In [\*United States v. Ruehle\*](#), No. 09-50161, 2009 WL 3152971 (9th Cir. Sept. 30, 2009), the [United States Court of Appeals for the Ninth Circuit](#) reversed a controversial [decision](#) by the [United States District Court for the Central District of California](#), which improperly excluded from evidence in a criminal prosecution certain statements made by a senior officer to corporate counsel conducting an internal investigation that the officer claimed were protected from disclosure by the attorney-client privilege. The Ninth Circuit held that the corporate counsel's alleged failure to give an "Upjohn warning" – which comes from the United States Supreme Court's decision in [\*Upjohn Co. v. United States\*](#), 449 U.S. 383 (1981), and is sometimes referred to as "corporate *Miranda* warning" – to the officer does not necessarily bar the government from using the statements made by the officer to corporate counsel. The decision potentially has far-reaching implications for groups as diverse as government prosecutors, individual corporate officers and corporate counsel in connection with the conduct of internal investigations of alleged corporate wrongdoing.

*Ruehle* arose out of statements made by defendant William Ruehle, a former chief financial officer ("CFO") at [Broadcom Corporation](#) ("Broadcom"), during an internal investigation into stock options backdating conducted by Broadcom's outside counsel, Irell & Manella LLP. Concurrent with the internal investigation, counsel represented Ruehle in connection with a related shareholder lawsuit. Subsequently, counsel disclosed to Broadcom's auditors and to the government statements made by Ruehle during the internal investigation. When the prosecution sought to use those statements against Ruehle, Ruehle argued that they were inadmissible because he made them in confidence to attorneys whom he reasonably believed were acting on his behalf as counsel.

The district court, applying California state law, determined that an attorney-client relationship existed between Ruehle and Broadcom's counsel based, in part, upon counsel's failure to give Ruehle an *Upjohn* warning before interviewing him. An "Upjohn warning" includes admonitions by counsel that it represents the corporation, not the individual employee, that anything said by the employee will be protected by a privilege that belongs to the company alone and can be waived by the company in its sole discretion, and that the individual employee has the right to consult with his own attorney if he has any concerns about his potential for legal exposure. The district court thus held that Ruehle's statements were protected by the attorney-client privilege and were inadmissible.

The Ninth Circuit reversed. The Court of Appeals, although skeptical, deferred to the district court's determination that no *Upjohn* warning had been administered to Ruehle. Nonetheless, the Ninth Circuit held that Ruehle had failed to meet his burden under federal law of establishing that statements made in the absence of the *Upjohn* warning constituted protected attorney-client communications. The Ninth Circuit noted that the district court erred by applying California state law, and not federal law, governing the attorney-client privilege when determining whether the privilege applied. Under federal law, the Ninth Circuit held, Ruehle had the burden – which he failed to meet – of establishing that the statements were made to counsel in confidence. To the contrary, the Court reasoned, Ruehle's senior position at the company and knowledge of a public company's reporting requirements suggested that, even absent an *Upjohn* warning, Ruehle could not reasonably have believed that statements made to counsel during an internal investigation would not be disclosed to third parties. In addition, the Ninth Circuit held, Ruehle failed to meet his burden under federal law of specifically identifying which statements purportedly were made for purposes of obtaining legal advice and which statements were not. Thus, the Ninth Circuit held that, even assuming that an attorney-client relationship existed between Broadcom's counsel and Ruehle, Ruehle's statements still were not shielded by the attorney-client privilege.

The Ninth Circuit's decision indicates that, while *Upjohn* warnings can be a valuable tool for counsel conducting a corporate investigation, they are not a predicate to the admissibility or disclosure of statements in subsequent criminal proceedings regarding the subject matter of that investigation. Instead, especially when dealing with sophisticated senior officers or directors, the federal courts will presume that employees understand the fundamental nature of an internal investigation and the likelihood that information collected during it will at some point be disclosed to third parties.

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