

# Corporate Miranda

## Clarifying Lawyers' Loyalty During an Internal Investigation

By Ashish S. Joshi

**I**nternal investigation into suspected wrongdoing in a company is a veritable minefield for all involved. The afflicted company's officers are in a tricky situation to be sure, as they worry over possible outcomes and consequences of an investigation, but this article aims to help the company's attorneys avoid adding to the muddle. One way to achieve this is to clarify the attorney's loyalty to each involved employee. Explicitly warning employees that an attorney conducting the investigation is not representing their best interests may have its disadvantages, but as cases explored below show, this clarification, known as a "Corporate Miranda," is necessary.

Corporate Miranda or *Upjohn* warnings, in essence, place every employee that company counsel interviews during an investigation under a cloud of suspicion. The warning is generally

provided to an employee being interviewed at the outset of an interview conducted by the company's lawyers during an internal investigation. At a bare minimum, the warning admonishes the employee that

1. Counsel represents the corporation and not the employee;
2. Communications between the employee and counsel will be privileged;
3. However, this privilege belongs to the corporation and the corporation alone can decide to exercise it or waive it.

At its core, Corporate Miranda attempts to clarify the loyalty of the lawyer conducting the investigation: I, the lawyer, owe my duty of loyalty to the company and not to you, an employee. In theory, a lawyer may, at least at the initial stage of the investigation, represent both the company and its employees—provided the company and individual clients are fully informed of potential conflicts and consent to multiple representations. The immediate advantages of such dual or multiple representation are enticing, especially from the company's perspective: avoid duplication of effort,

enhance employee cooperation, permit a unified defense, and, last but not least, provide a considerable saving in cost and attorney fees. The downside of dual representation is that it may undermine the integrity and credibility of the investigation, risk a waiver of any applicable privilege, and/or land a lawyer in an ethical quandary or, worse, facing a charge of obstruction of justice.

The importance of delivering a clear Corporate Miranda was highlighted in the court filings of two recent criminal prosecutions, each initiated after the company retained outside counsel to conduct an internal investigation or to represent the company in an ongoing governmental investigation.

### The Broadcom Case

*A Conflicted Relationship from the Outset.* William J. Ruehle is a former chief financial officer of Broadcom Corporation. In the spring of 2006 there were a series of news articles alleging improper practices of stock option granting at Broadcom and other corporations. Following this, in May 2006, Broadcom retained the law firm Irell & Manella (Irell) to conduct an internal

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investigation into its stock option practices. At this time, both Broadcom and Ruehle had long-standing relationships with Irell. In 2002, Irell represented both Broadcom and Ruehle personally in several securities-related actions that concluded at the end of 2005. Shortly after Irell was retained to conduct an internal investigation by Broadcom, on May 25, 2006, a group of shareholders filed a derivative action against Ruehle and other officers of the company. Also, on May 26, 2006, in another action, Ruehle was named as a defen-

Irell's disclosures were summarized by the government in FBI 302 memorandums. Irell neither sought nor did Ruehle consent to any of these disclosures. Ruehle first learned about Irell's disclosures and the government's intended use of them against him when the FBI 302 memorandums were produced in December 2008 in connection with the government's criminal case against Ruehle. Ruehle promptly moved to suppress this evidence and asserted that his conversations with Irell were privileged communications. Judge Cor-

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Both actions focused on the stock option practices at Broadcom. Irell accepted individual representation of Ruehle in both actions in addition to its representation of Broadcom in connection with the internal investigation.

*Failure to Clarify Duty of Loyalty.* In May of 2006, Ruehle received several e-mails from the Irell lawyers regarding their representation of him in the civil actions. The e-mails updated Ruehle on the lawyers' progress in the civil actions. Then, on June 1, 2006, Irell lawyers met with Ruehle and interviewed him regarding their investigation of Broadcom's stock option granting practices. At this time, the Irell lawyers did not clarify to Ruehle that they were not his lawyers but were acting solely in the best interest of Broadcom. Nor did the lawyers suggest to Ruehle that he might want to consult with another lawyer before speaking with them.

On June 13, 2006, the SEC commenced its investigation of the stock option granting practices at Broadcom. During this time, Ruehle continued to receive legal advice from Irell regarding their defense of him and other officers of Broadcom in the ongoing civil actions. In August of 2006, at Broadcom's direction, Irell disclosed the substance of Ruehle's interviews to outside auditors and then to the SEC and the U.S. Attorney's Office.

The court held that given the circumstances that Ruehle had a long-standing relationship with Irell and that Irell represented Ruehle in the ongoing civil actions during the time that Irell conducted internal investigations at Broadcom's directive, Ruehle was reasonable in believing that he was communicating with his attorneys. Ruehle reasonably believed that when he was "interviewed" by the Irell lawyers, the interviews were being conducted to gather information in preparation for his defense in the ongoing civil actions. Had Ruehle understood that the Irell lawyers might disclose his statements to third parties, he would have stopped the interviews, would have asked "some very serious questions at that time," and would never have agreed to provide information that Irell could then turn over to the government.

*Corporate Miranda, Even If Delivered, Would Have Been Inadequate.* As to the *Upjohn* warning, or Corporate Miranda, the court expressed serious doubts whether any was given to Ruehle. Ruehle did not remember being given any warning, no warning was referenced in the Irell lawyer's notes from the interview, and no written record of the warning existed in this case. But even

if an *Upjohn* warning had been given to Ruehle, the court held that it would be woefully inadequate in light of the undisputed attorney-client relationship between Irell and Ruehle. In such circumstances, the court held that an *Upjohn* warning is "nonsensical at best and unethical at worst."

*Lawyers' Omissions Violated Their Duty of Loyalty.* Judge Carney then made a finding that Irell committed "at least three clear violations of its duty of loyalty to Mr. Ruehle." First, Irell had a duty to disclose to Ruehle the potential conflict of interest created by the dual representation and obtain Ruehle's written consent to that conflict; Irell violated this duty. Second, Irell breached its duty of loyalty to Ruehle by interrogating him for the benefit of another client, Broadcom. Third, Irell disclosed Ruehle's privileged communications to third parties without his consent. The court found Irell's ethical breaches to be "very troubling" and referred the firm to the State Bar of California for appropriate discipline.

The Broadcom case makes it clear that before accepting an internal investigation assignment, the company's lawyers must thoroughly undertake a conflict of interest check. Past representation of a company employee or the lawyers' past or current relationship with an employee must be carefully analyzed and taken into consideration. After all, as this case demonstrates, in some situations, even delivering a clear Corporate Miranda may not absolve the lawyers for committing an ethical violation.

### **The Stanford Case**

*Lawyer Retained to Represent the Company.* Laura Pendergest-Holt is a former chief investment officer of the Stanford Financial Group (SFG). Since June of 2008, the SEC had been conducting an investigation into allegations that SFG and its executives had defrauded investors of more than \$8 billion in deposits. During the same time period, other governmental agencies also were conducting a criminal investigation into these same allegations. SFG retained

an attorney of the law firm Proskauer Rose (Proskauer) to “represent the companies in regulatory matters.” In January 2009, the SEC issued subpoenas to SFG and its related entities and to its executives, including Pendergest-Holt. On January 21, 2009, Pendergest-Holt participated in a meeting with other top SFG executives and the attorney from Proskauer. The group agreed that the Proskauer lawyer would notify the SEC that Pendergest-Holt, along with another executive, would testify before the SEC.

*Keeping 'em Inside the Tent: Let's "Pray Together."* On January 22, 2009, the SEC attorneys met with the Proskauer attorney to discuss the issues regarding the SEC subpoenas. The SEC informed the Proskauer attorney that they wanted to depose individuals with the knowledge of the “entire investment portfolio.” Proskauer informed the SEC that Pendergest-Holt (along with another executive) could provide information regarding SFG’s entire investment portfolio. In an e-mail dated January 24, 2009, to a SFG executive (that was forwarded to Pendergest-Holt), the Proskauer attorney noted that “one problem [he] foresee[s] is that [Pendergest-Holt] knows about tier 1 and tier 2, but little about tier 3. [Pendergest-Holt] will have to get up to speed on tier 3 before the SEC investigation.” Proskauer’s lawyer also noted that he would like to make sure that “[Pendergest-Holt] [has] ample time to prepare and practice the week before the SEC meeting.”

On January 27, 2009, the Proskauer lawyer sent an e-mail to Pendergest-Holt advising her that she would need to address all three investment tiers and not just Tier I and Tier II. On or around February 3, 4, and 5, 2009, Pendergest-Holt met with other SFG executives and the Proskauer lawyer at the SFG office in Miami. Pendergest-Holt and other SFG executives made presentations to the group concerning the value of the investments within Tiers I, II, or III. Some of the members of the group were surprised and unnerved by Pendergest-

Holt’s “revelations.” One witness later described to the SEC that after watching Pendergest-Holt’s presentation, he felt as if he “had been kicked.” One senior executive voiced his concerns about the true nature of the Tier III investments and declared that he would not testify before the SEC “as the information he obtained at the meeting was not the information he disclosed to investors or [foreign] regulators.” Other executives stated that they wanted to report the information learned at these meetings to the SEC. The Proskauer attorney was present during all of these meetings. On February 6, 2009, the group again met at the SFG Miami office. At this meeting, one of the group members broke down crying because of the revelations made during the previous meetings. This executive told the group (including the Proskauer attorney): “If you are going to go through more information I didn’t know, I don’t want to be there, and I’m going to the authorities.” At this the Proskauer attorney walked over to the executive and “suggested they begin to pray together.”

#### *Who Did the Lawyer Represent?*

On February 10, 2009, Pendergest-Holt appeared in the company of the Proskauer attorney at the SEC’s Texas regional office to give her testimony, which was taken under oath. At the outset, Pendergest-Holt was asked by

The Proskauer lawyer responded:

I represent her insofar as she is an officer or director of one of the Stanford affiliated companies.

Upon hearing this, the SEC lawyer asked Pendergest-Holt whether she would “like to have personal representation of counsel before proceeding?” Pendergest-Holt declined. At several times during the testimony, the SEC lawyers questioned Pendergest-Holt about her conversations with Proskauer while admonishing her to answer the questions without disclosing the substance of these conversations. At times, the Proskauer lawyer intervened, objected, and advised Pendergest-Holt to not answer a question that could lead to a disclosure of privileged information. Also, during her testimony, Pendergest-Holt conferred with the Proskauer attorney.

Later during a break in questioning, the Proskauer lawyer called his secretary to “pull the engagement letter to be clear who [he] represent[s].” The lawyer then clarified on the record that he was engaged by SFG and all of its affiliated companies.

*Lawyer’s Noisy Withdrawal.* Shortly after Pendergest-Holt’s testimony, the Proskauer attorney wrote to the SEC and made a “noisy withdrawal,” disavowing anything he had ever told the

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an SEC lawyer whether she was represented by counsel, to which she answered: “I am”—obviously referring to the Proskauer attorney. The SEC lawyer then asked the Proskauer lawyer to make an appearance for the record. The Proskauer lawyer responded by stating his name, the firm’s name, and that he represented *the company*. When the SEC lawyer asked point blank:

Just so we’re clear. As I understand your statement, you do not, as far as you’re concerned, represent [Pendergest-Holt] today?

agency about the SFG investigation. On February 25, 2009, the government filed a criminal complaint in the U.S. District Court for the Northern District of Texas against Pendergest-Holt, alleging that Pendergest-Holt obstructed the SEC investigation by failing to reveal the truth and by making false statements to the SEC agents.

*A \$20 Million Legal Malpractice Lawsuit.* A month later Pendergest-Holt filed a civil malpractice lawsuit against the Proskauer attorney seeking damages in excess of \$20 million. Pendergest-

Holt alleged that Proskauer's legal malpractice resulted in Pendergest-Holt being arrested and ultimately charged in a felony complaint with obstruction of a proceeding before the SEC. Pendergest-Holt also alleged that she met

with the Proskauer attorney on several different occasions to prepare for her testimony and that the attorney accompanied her to her sworn testimony before the SEC. Based upon the representations that the attorney made to

her, Pendergest-Holt alleged that she believed that Proskauer was "assisting her as her lawyer[], [was] representing her interests, and [was] protecting her interests as her attorney[] in her individual capacity." Pendergest-

## Ten Tips Concerning Corporate Miranda Warnings

1. Undertake a thorough conflicts check before accepting the internal investigation assignment from a corporate client. Determine whether investigation may touch upon matters on which counsel has previously advised the company or its officers. If so, this may materially interfere with counsel's independent professional judgment. Further, if counsel represents any officer or employee of the company in another action, counsel must advise his clients—both the company and the officer—about a potential conflict of interest and obtain a written waiver concerning the conflict from both before accepting the assignment.
2. Avoid dual representation at all costs. Counsel should avoid making a statement that he also could represent an employee "as long as no conflict arose." Apart from creating unnecessary and unwarranted complexities regarding the role and duty of the counsel, dual representation also could jeopardize the company's *raison d'être* for conducting an investigation, which often is to cooperate with authorities and waive the attorney-client privilege to avoid a criminal indictment. Also, care should be taken to avoid creating a dual relationship from the outset—any Corporate Miranda warnings given after an attorney-client relationship is created are irrelevant.
3. Before interviewing the employees, inform them about the purpose of the interviews. Depending upon the facts of the case, advise each interviewee of the following: (a) the fact that the government is conducting an investigation, (b) the subject matter of the investigation, (c) that counsel has been retained to provide advice to the company in this matter, and (d) that the interview is necessary for the counsel to obtain the information necessary to provide appropriate advice to the company.
4. Before commencing the interview, deliver a Corporate Miranda warning to an employee being interviewed. Advise the interviewee that (a) counsel represents the company, not the employee, and is conducting the interview as counsel to the company; (b) while the interviews are subject to the attorney-client privilege, the privilege is the company's, and not the employee's, and the company alone can assert or waive it; and (c) the employee has no role in making a decision whether or not to waive the privilege and provide the information to third parties, including the government.
5. Prepare a form summarizing the Corporate Miranda and have it ready at the time of the interviews. After orally delivering the warning to an employee, give this form to the employee and ask the employee to sign this form, thereby affirming that he has received and understood the warning. If the employee is reinterviewed in the future or the interview is continued on another day, redeliver the warning. This may appear as overkill. However, if an employee later claims that he was under an impression that he was talking to "his" attorney and attempts to assert privilege concerning his interview, this signed form may be crucial in determining that the employee could not have had reasonable expectation that he was talking to his, and not the company's, lawyer.
6. Advise the employee that the substance of the interview may be disclosed to third parties, including the government. Although this may cause the employee to be less forthcoming, this may be necessary where the matter under investigation is not yet known to the government and where the company has a statutory obligation to disclose the matter.
7. Ask the employee whether he has any questions and clarify any issues that may be subject to misinterpretation. If an employee does seek clarification, document these questions and your answers to the employee. This may go a long way to demonstrate that the employee was not misled, nor could he have any illusion that he was talking to his lawyer and not the company's lawyer.
8. If at any point an employee asks whether she needs her own attorney, tread with caution. The better practice is to have independent lawyers available to represent the employee. However, in a real-world scenario this often depends upon the nature of the investigation, the size of the company, and the circumstances surrounding the investigation.
9. Whether or not the company makes independent lawyers available to an employee, under no circumstances should company counsel provide legal advice to the employee. Doing so may risk a later finding of dual representation.
10. After the interview, memorialize the substance of the interview with each witness. The memorandum should not resemble a transcript but should document counsel's standard introduction, delivery of Corporate Miranda, any questions from a witness and clarification provided by the counsel, and closing remarks to the witness along with counsel's mental impressions with respect to the witness. Mark this memorandum as being subject to attorney-client privilege and the work product doctrine.

Holt alleged that Proskauer caused her (a nonlawyer) to reasonably believe that since they represented her interests prior to and during the testimony before the SEC, the communications by and between her and Proskauer were privileged. Instead, Pendergest-Holt alleged, Proskauer acted in the best interest of SFG and its sole shareholder, Allen Stanford. Pendergest-Holt also alleged that unbeknownst to her, the night before the Proskauer attorney met with her to prepare her for her testimony before the SEC, the attorney “had solicited a multi-million dollar retainer from Stanford to represent Stanford personally.” Pendergest-Holt also alleged that when Proskauer learned—during the ongoing testimony before the SEC—that it was not authorized to represent Pendergest-Holt in her individual capacity and could not adequately do so, it took no action to protect her interests even though the attorney-client relationship with her in her individual capacity was already

established. Pendergest-Holt alleges that Proskauer should have stopped the testimony, formally withdrawn from representing her, advised her of the necessity of the retention of another attorney, and allowed her the ability to do so. Instead, she argued, Proskauer “hung her out to dry” and “a false criminal complaint resulted.” At the time of writing this article, it appears that Pendergest-Holt has dismissed her lawsuit against Proskauer without prejudice to refiling.

As these cases demonstrate, the role

While there are no easy black-and-white rules, some guideposts do emerge from a study of the above cases. *See* sidebar to this article. Company counsel would do well to take them into consideration. Of course, these suggestions are by no means exhaustive. Practitioners may have a different take on these suggestions; some may find these to overly err on the side of caution, while some may believe that the suggestions do not include some pointers that they may routinely follow in their practice.

### **The role of company counsel in conducting an internal investigation is inherently complex.**

of company counsel in conducting an internal investigation is inherently complex. An additional layer of complexity is added at the time company counsel interviews and interacts with company employees during the course of an investigation.

Conducting an internal investigation is not an easy task. At the end of the day, nothing can replace the requisite expertise and experience of counsel required to navigate the turbulent and perilous waters involved in conducting an internal investigation.