ALFA INTERNATIONAL
2015 INSURANCE LAW SEMINAR
June 10-12, 2015 – The Ritz-Carlton Battery Park –
New York, New York

ETHICS FOR IN-HOUSE COUNSEL:
ADDRESSING COMMON ETHICAL DILEMMAS

Lawrence A. “Lex” Dunn
Moderator
MORRIS & MORRIS
Richmond, Virginia
LDunn@morrismorris.com
Corporations, In-House Counsel, and Conflicts of Interest: 
a New Decision Provides Helpful Guidance

Corporations often call upon their in-house counsel to handle litigation which involves both the corporation and its employees. Care must be taken lest in-house counsel become ensnared in a conflict of interest, and a case from California, *Yanez v. Plummer*,\(^2\) sheds light on issues that corporations and their in-house counsel need to identify and take very seriously.

In this case, Michael Yanez sued his former employer, the Union Pacific Railroad Co., for wrongful discharge. He also sued Union Pacific's in-house counsel, Brian Plummer, for legal malpractice, breach of fiduciary duty and fraud. The trial court's decision granting in-house counsel's motion for summary judgment was reversed on appeal, where the court found a genuine issue of material fact as to whether in-house counsel's conduct was a substantial factor in causing termination.

The facts show that Yanez was at work assisting another employee, Robert Garcia, with replacing locomotive motors. Garcia fell and was injured. Yanez thereafter provided conflicting statements as to how Garcia was injured. The first statement simply made reference to the fact that Garcia had fallen, while the second statement indicated that Yanez had actually seen Garcia fall.

\(^{1}\) Materials prepared by Robert Paschal of Young Moore and Henderson, PA, Raleigh, North Carolina.  
Garcia brought an FELA action against Union Pacific seeking compensation for his work-related injuries. Union Pacific’s in-house counsel, Brian Plummer, was assigned to represent Union Pacific in the Garcia suit.

Yanez met with attorney Plummer just prior to being deposed in the Garcia action, and Plummer confirmed that Yanez had not actually seen Garcia fall. Nothing was said at that time about the two conflicting statements.

Yanez voiced concern about his job because his deposition testimony was likely to be unfavorable to Union Pacific. He asked Plummer who would “protect” him at his deposition. Plummer indicated that Yanez was a Union Pacific employee, that Plummer was his attorney, and so long as he told the truth, his job would not be affected. Plummer made no mention to Yanez about any conflict of interest involving his representation of Union Pacific and Yanez at the deposition.

When Yanez was deposed, Garcia’s attorney elicited testimony from Yanez that Yanez had not witnessed Garcia’s fall. Yanez also testified about unsafe conditions at the site of the accident. Then Plummer, in-house counsel of Union Pacific, questioned Yanez. Plummer highlighted Union Pacific’s “total safety culture” and sought to distance Union Pacific management from allegedly unsafe working conditions. He then confirmed that it was Yanez’s testimony that Yanez did not see Garcia fall. Plummer then addressed Yanez’s written statements. Plummer only marked Yanez’s second statement about seeing Garcia slip and fall as a deposition exhibit and made no reference to his first statement. Yanez mentioned that he had wrongly worded his second statement, but this produced no follow up by Plummer.
The director of Union Pacific’s locomotive facility, Dennis Magures, attended Yanez’s deposition as a representative of Union Pacific. Magures obtained a copy of the deposition transcript to confirm that Yanez’s testimony that he did not “witness” or “see” Garcia slip and fall conflicted with Yanez’s second statement that he saw Garcia slip and fall.

This confirmation led to a disciplinary hearing against Yanez and then to his termination from Union Pacific for violating company policy against dishonesty. Magures testified at the disciplinary hearing that the dishonesty charge against Yanez was based on the contradiction between Yanez’s statement about seeing Garcia fall and his deposition testimony about not seeing the fall. However, at the disciplinary hearing Yanez explained that he wrote the second statement “in the haste of the moment;” that instead of stating, “I saw Bobby slip and fall down on oil-soaked floor,” the statement should have read (in line with Yanez’s first statement), “I saw that Bobby had slipped and fell down on oil-soaked floor.”

Yanez’s suit hinged on the fact that Yanez and Union Pacific occupied adverse positions throughout Garcia’s suit against Union Pacific. Yanez was working with Garcia when he was injured, and he was the only witness to the events. He was also aware of unsafe work conditions that may have contributed to Garcia’s injury.

Despite these conflicting interests, Union Pacific’s in-house counsel represented both Union Pacific and Yanez during Yanez’s deposition.

Under the California State Bar Rules for Professional Conduct, a lawyer representing more than one client shall not, without the informed consent of each client, (1) accept representation of more than one client in a matter in which the interests of the
clients potentially conflict or (2) accept or continue representation of more than one client in a matter in which interests of the clients actually conflict. (State Bar Rules Prof. Conduct, Rule 3-310(C)(1)).

Union Pacific’s in-house counsel did not inform Yanez about conflicts with Union Pacific and did not obtain Yanez’s written consent for the representation despite such conflicts. Yanez argued that Union Pacific’s in-house counsel portrayed him in the worst possible light in order to benefit Union Pacific and ultimately to fire Yanez.

The appellate court noted that it was true that Yanez wrote in his second statement that he “saw” Garcia slip and fall, and that it was true that Yanez first admitted to Garcia’s counsel in the deposition that he did not “witness” Garcia’s accident. However, the appellate court then noted that it was attorney Plummer who highlighted Yanez’s deposition testimony that he did not “see” Garcia slip; it was Plummer who presented the second statement at the deposition; it was Plummer who caused Yanez, under oath at the deposition, to effectively admit that his deposition testimony conflicted with his second statement; it was Plummer who did not offer Yanez a chance to explain this discrepancy; and it was Plummer who failed to present the first statement as an exhibit at Yanez’s deposition.

The trial court granted Plummer’s motion for summary judgment. The California Court of Appeal reversed, concluding that Yanez had presented a triable issue of material fact that but for the alleged malpractice, breach of fiduciary duty and fraud of Union Pacific’s in-house counsel, Yanez would not have been terminated.

There are times when the position of the corporation and its employees are identical. But when these interests diverge, Yanez makes it clear that the corporation

June 10-12, 2015 5
and its in-house counsel must carefully examine the matter to determine whether the employee should be represented by in-house counsel. It is important to refer the employee to his or her own counsel as necessary and address the conflict of interest with care when the matter first arises.

II. Attorney-Client Privilege and Corporations – Preserving the Privilege

As noted above, corporations and their in-house counsel should continually be sensitive to the identification and proper handling of conflicts of interest that can arise when the corporation and its employees have divergent, or even potentially diverging, interests. Care must also be taken to ensure that all parties understand the scope of the attorney-client privilege and that necessary steps are taken to preserve that privilege. The privilege belongs solely to the corporate client, and can be lost or waived if it is not zealously protected.

The attorney-client privilege protects certain communications made between an attorney and client from compelled disclosure. The purpose of the privilege is “to encourage clients to make full disclosure to their attorneys.”

This rationale for the privilege has long been recognized by the United States Supreme Court. In *Hunt v. Blackburn*, the Supreme Court noted that privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the

---

apprehension of disclosure." In *United States v. Louisville and Nashville R. Co.*,\(^5\) the Supreme Court acknowledged that “complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this court has assumed that the privilege applies when the client is a corporation.”

The leading case on the scope of the attorney-client privilege in the context of corporations is *Upjohn Co. v. United States*.\(^6\) A detailed recitation of the *Upjohn* facts and case history is helpful in understanding the issue of attorney-client privilege for corporations.

*Upjohn* Company manufactures and sells pharmaceutical products in the United States and abroad. In January 1976 independent accountants conducting an audit of one of the Upjohn foreign subsidiaries discovered that the subsidiary made payments to, or for the benefit of, foreign government officials in order to secure government business. The accountants advised Upjohn’s General Counsel of the issue, and General Counsel then consulted with both outside counsel and Upjohn’s Chairman of the Board. It was determined that Upjohn would conduct an internal investigation of what were termed “questionable payments.” As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to “All Foreign and General Area Managers” over the signature of Upjohn’s Chairman. The letter indicated that the Chairman had asked the company’s General Counsel to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by Upjohn or

--

any of its subsidiaries to any employee or official of a foreign country. Respondents were instructed to send their responses directly to the company’s General Counsel. Upjohn’s General Counsel and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

In March 1976 the company voluntarily submitted a preliminary report to the Securities and Exchange Commission, disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service. The IRS immediately began an investigation to determine the tax consequences of the payments. Upjohn provided the Special Agents with lists of those interviewed and those who had responded to the questionnaire.

On November 23, 1976, the IRS issued a summons demanding production of files relative to the investigation. Additionally, the IRS indicated that the documents to be produced “should include but not be limited to written questionnaires sent to managers of Upjohn Company’s foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.”

Upjohn declined to produce the documents relating to the written questionnaires on the grounds they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys since they were prepared in anticipation of litigation.

On August 31, 1977, the United States filed a petition seeking enforcement of the summons. This matter was heard in the United States District Court for the Western
District of Michigan, which adopted the recommendation of the Magistrate who concluded that the summons should be enforced. Upjohn then appealed to the Court of Appeals for the Sixth Circuit, which held that the privilege did not apply “to the extent that the communications were made by officers and agents not responsible for directing Upjohn’s actions in response to legal advice… for the simple reason that the communications were not the ‘client’s.’” The Supreme Court reversed the Sixth Circuit decision and held that the communications sought by the IRS were protected from disclosure.

Justice Rehnquist delivered the *Upjohn* opinion, which first rejected the “control group” test for the attorney-client privilege. The control group test provides that the privilege may be invoked only by those employees who communicate with counsel and who are in a position to control, or take a substantial role in the determination of, the course of action a corporation may take based on the legal advice received. In rejecting the control group test, the Court indicated that this test frustrates the purpose of the attorney-client privilege by “discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client.”

The Supreme Court then adopted the “subject matter” test, holding that the communications at issue in *Upjohn* were protected because:

- They were made to in-house counsel at the direction of corporate superiors concerning matters within the scope of the employee’s in-house duties;

---

7 *Upjohn*, 449 U.S. at 1225.
8 *Id.* at 402.
9 *Id.* at 392.
• The information was not available from upper-level management, and
• The employees were aware that they were being questioned in order for the corporation to receive legal advice. 10

A key takeaway from *Upjohn* is that counsel may confer with employees of any stature and any employee may seek legal advice from counsel, so long as the *Upjohn* criteria enunciated above are met.

When in-house counsel work in their capacity as attorneys for the corporation, investigations of corporate activity can be protected from disclosure by the attorney-client privilege if the four prongs of the *Upjohn* “subject matter test” are followed. However, the privilege does not apply to business advice and strategy provided by in-house counsel. This can create a friction point and potential hurdle to asserting the attorney-client privilege because the fourth prong requires that the client must have sought legal advice, as opposed to simply seeking business advice. The “legal” vs. “business” dichotomy should be kept in mind at all times, with the attorney-client privilege applying to legal matters, but not to business ones.

**BEST PRACTICES TO KEEP IN MIND:**

• One practice for compliance with *Upjohn* is that the in-house representative should be from top tier management or one who is cloaked with authority to make significant decisions for the corporation.

• Confine distribution of communications with counsel only to those who absolutely, positively, need to know about the communications. When

10 Id. at 394; see also [http://www.birnbaumgodkin.com/smoking-gun.php](http://www.birnbaumgodkin.com/smoking-gun.php).
communications are generated, indicate explicitly that the purpose of the communication is to provide legal, not business advice.

- Beware of the use of email for privileged communications. The prospect of an unintentional waiver can arise easily if the communication is forwarded to one who is outside the zone of privilege.
- When business advice is discussed along with legal advice, try to address the issues separately. This requires advanced planning and thought, but is well worth it.

Be mindful that one of the requirements for the attorney client privilege to apply is that the client must have sought legal advice as opposed to business advice. Lawyers and non-lawyers alike must be cognizant that in-house counsel can often play a dual role of business advisor and attorney providing legal advice. The attorney-client privilege applies only the legal advice provided by counsel, a rule which should be acknowledged daily.

III. “Corporate Miranda” Warnings and Internal investigations: Who is represented by whom?

As the Upjohn case (Section II above) shows, corporations are faced with a variety of thorny issues when conducting internal investigations. Preserving the attorney-client issue is one significant issue. Another arises when attorneys interview employees concerning an internal investigation. Ethical problems of the first order arise if there is no clarity concerning who is representing whom.

In Upjohn, the Court held that if specified criteria are satisfied, the attorney-client privilege protects corporate communications regardless of the stature of the employee.
involved in the communication with counsel.\textsuperscript{11} When officers and employees disclose confidences to in-house counsel to assist counsel’s provision of legal advice to the corporation, these confidences are protected only if the corporation decides to assert the privilege.\textsuperscript{12} The privilege is the corporation’s alone, and employees taking part in the interviews generally cannot prevent disclosure.\textsuperscript{13}

Following the \textit{Upjohn} decision, the American Bar Association (ABA) promulgated model rules imposing on attorneys specific obligations to clarify their roles in settings like those that arose in \textit{Upjohn}. ABA Model Rule 1.13(f) requires a lawyer for a corporation or other organization to “explain the identity of the [lawyer’s] client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” The official commentary to this model rule recommends that in-house counsel, when conducting an interview of a company employee, clarify that “the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussion between the lawyer for that organization and the individual may not be privileged.”\textsuperscript{14}

Second, ABA Model Rule 4.3 requires attorneys, when dealing with unrepresented persons, to clarify ambiguities relating to the scope and extent of the professional representation. When an attorney “knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”\textsuperscript{15} The rule further

\textsuperscript{11} \textit{Upjohn}, 449 U.S. 395-397.
\textsuperscript{12} \textit{Id.}, 449 U.S. 389-392.
\textsuperscript{13} \textit{Id.}, 449 U.S. 389-392.
\textsuperscript{14} Model Rules of Prof’l Conduct R. 1.13 (1983).
\textsuperscript{15} Model Rules of Prof’l Conduct R. 44.3 (1983).
cautions that the attorney should not provide legal advice to the unrepresented individual except the advice to obtain counsel.\footnote{Model Rules of Prof'l Conduct, Rule 44.3 (1983).}

The *Upjohn* decision, and the ABA model rules that followed it, impose on attorneys the affirmative duty of disclosure. As a result, in-house counsel started the process of providing *Upjohn* warnings in the ordinary course of business prior to conducting employee interviews. These “*Miranda*” warnings have oftentimes been provided verbally and consist of the following four components:

1. Counsel represents the company – not the employee – and is interviewing the employee to gather information in order to provide legal advice to the company;
2. The interview is confidential and covered by the attorney-client privilege;
3. The privilege belongs to and is controlled by the company;
4. Because the company – not the employee – owns the privilege, the company, but not the employee, may elect in the future to waive any privilege and provide information derived from the interview to third parties, including prosecutors and regulators. (See also *Wall Street Lawyer*, August 2009, Vol. 13, Issue 8, Beefing Up “Corporate Miranda Warnings” and Upjohn Warnings: Recommended Best Practices when Corporate Counsel Interacts with Corporate Employees; ABA White Collar Crime Working Group of the ABA’s Criminal Justice Section, July 17, 2009.)

Keep in mind that the corporation is the entity with exclusive ownership and control of the attorney-client privilege. The corporation should not waive it
unintentionally, and if the intention exists to waive the privilege, it should be done only after careful thought and deliberation.

Three relevant decisions provide insight into why it is important to issue Upjohn or Miranda warnings. In In Re Gray Grand Jury Subpoena17, AOL Time Warner initiated an internal investigation. In-house counsel gave several employees an Upjohn warning, but counsel also stated that unless, and until the parties’ interests diverged, counsel “could” represent the employees, as well as the corporation. AOL Time Warner later waived the privilege over statements the employees made to in-house counsel during the witness interviews.

The employees tried to maintain the privilege and argued that the attorneys’ statement that they “could” represent the employees as well as the corporation provided a basis to maintain the privileged nature of the interviews.

The Fourth Circuit Court of Appeals ruled against the employees and validated AOL Time Warner’s waiver of the privilege. The Court noted that because the attorneys had stated “we can” rather than “we do” represent the employee, the attorneys’ statements did not create an attorney-client relationship between the attorneys and employees.18

The Court noted the “legal and ethical minefield” that can result when employees undertake to represent both employee and company.19 The Court explicitly opined that

17 In re Grand Jury Subpoena, 415 F.2d 333 (4th Cir. 2005).
18 Id. at 340.
19 Id. at 340.
Upjohn warnings should be strengthened, not weakened, in light of the obvious ethical concerns.20

A second decision highlights the importance of written Upjohn warnings. In United States v. Nicholas,21 a federal securities fraud prosecution, the judge suppressed all statements made by the Chief Financial Officer of Broadcom to outside counsel during an internal corporate investigation. There was evidence that the attorneys had given the CFO a verbal Upjohn warning, but the Court ruled that counsel should have obtained a written acknowledgement from the CFO that counsel might disclose the content of the interview to such third parties as auditors and federal prosecutors.

The law firm conducting the internal investigation for Broadcom had also represented the CFO in his personal capacity. Because of this dual representation, the Court found that the law firm breached its duty of loyalty to the CFO when it (1) failed to obtain the CFO’s informed written consent to give simultaneous and adverse representation of both the CFO and Broadcom; (2) interrogated the CFO for the benefit of Broadcom; and (3) disclosed the CFO’s privileged communication to third parties without his consent. Note that the judge further found that counsel’s actions constituted “ethical misconduct” worthy of State Bar disciplinary proceedings.22

The trial court’s ruling with respect to CFO Ruehle was reversed on appeal by the United States Court of Appeals for the Ninth Circuit applying California state law

---

20 In re Grand Jury Subpoena, 415 F.2d at 340.
22 Id. at 1121.
rather than the federal common law of privilege. However, the Ninth Circuit rebuffed efforts by the CFO to have his statements to counsel held in confidence, ruling that the CFO’s statements to counsel were not made in confidence but rather for the purpose of disclosure to outside auditors. Thus, the CFO’s efforts to suppress his statements to counsel failed. The Ninth Circuit noted the well-settled rule that any voluntary disclosure of information to a third party waives the attorney-client privilege, regardless of whether such disclosure later turns out to be harmful. This line of cases is instructive on corporate Miranda warnings, internal investigations and the difficulties that can arise when the attorney-client privilege is waived.

The issue of “who represents whom” and the consequences of not knowing the answer to this essential inquiry are aptly demonstrated in the case of Pendergest-Holt v. Sjobolm. In this matter, a former employee of the Stanford Group lodged a malpractice complaint against her former employer’s outside counsel. The employee claimed that counsel never disclosed that he represented only the company, and this allegedly caused her to misunderstand counsel’s role and it induced her to give sworn testimony that resulted in her facing criminal prosecution for obstruction of justice.

The employee alleged she was led to believe that counsel to the Stanford Group also personally represented the employee in connection with testimony that she gave to the Securities and Exchange Commission (SEC). The complaint further alleged that counsel did not inform her:

---

23 United States v. Ruehle, 583 F.3d 600, 608 (9th Cir. 2009).
24 Id., 583 F.3d at 609.
25 Id. at 612. (Emphasis in original.)
• Of the need to hire independent counsel to protect her personal interests;
• That her interests and those of the Stanford Group were adverse;
• That she was not required to testify and that by testifying she was potentially subjecting herself to criminal liability; or
• The conversations between her and counsel were not privileged.

The employee also claimed that her testimony before the SEC was against her own interests. A federal grand jury later indicted the employee on charges of obstruction of justice for alleged false testimony, and this employee ultimately pled guilty to these charges.27

These cases demonstrate that when attorneys assist corporations with internal investigations, they should strongly consider written *Miranda* warnings that are both standardized and memorialized. Those individuals involved should know precisely what counsel's role is, and who counsel represents and just as importantly, who he or she does not represent. Lastly, the ownership and control of the attorney-client privilege should also be addressed. The less room for misunderstanding, the better things will be. And, to provide clarity as memories fade, it is good practice to continually have all of the elements of the warning signed and dated by all who participate.

**IV. Ex Parte Communications with In-House Counsel**28

As the cases discussed above demonstrate, identifying and avoiding conflicts of interest is crucial for corporations and their counsel. Preserving the attorney-client privilege is significant as well. It is also important that corporations and their attorneys

---

28 Prepared by Douglas R. Richmond, Managing Director of Aon Risk Solutions, Chicago, Illinois.
understand the ethical implications of *ex parte* communications with in-house counsel, and the following article by AON’s Doug Richmond addresses this topic in detail.

It is generally accepted in litigation that *ex parte* communications with represented persons are off limits. This understanding is enforced through Model Rule of Professional Conduct 4.2, which provides: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” Model Rules of Prof. Conduct R. 4.2 (2014) (hereinafter Model Rules).

California, which has yet to adopt the Model Rules, has a similar rule. California Rule 2-100(A) states: “While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.” Cal. R. Prof. Conduct 2-100(A) (2005).

Few issues in litigation are as contentious as lawyers’ attempts at *ex parte* communication in alleged violation of this Rule. Lawyers representing parties that are the subject of *ex parte* communications frequently view those contacts as attempts to obtain unfair advantage in the related matters. At the very least, such communications threaten to undermine the lawyer’s relationship with his client. On the other hand, the lawyer initiating the contact may believe that the communication is permissible under the circumstances and respond energetically if accused of misconduct. In fact, there are times that *ex parte* communications with represented parties are permissible.

The reasoning here is simple. Rule 4.2 is intended to protect a client against unfair tactics and overreaching by the lawyer making the communication, and against harm arising from ill-advised statements that the client would be unlikely to make if her lawyer was present. Neither concern is implicated where the *ex parte* communication is aimed at another lawyer. Douglas R. Richmond, *et al.*, Professional Responsibility in Litigation, 231 (2011). Furthermore, prohibiting lawyers from communicating directly with organizations’ inside counsel is inimical to the efficient resolution of disputes. Thus, as a general matter, there is no requirement that the lawyer wishing to speak with inside counsel first obtain permission from the organization’s outside counsel.

*In re Grievance Proceeding*, 2002 WL 31106389, 2002 U.S. Dist. LEXIS 18417 (D. Conn. July 19, 2002), is a rare case on-point. The plaintiff’s lawyer in that case twice wrote a defendant’s general counsel after outside defense counsel would not respond to discovery or settlement offers. After the first letter, the defense lawyer asked
the plaintiff’s lawyer not to communicate with the general counsel. *Id.* at *1. After the second letter, the general counsel reported the plaintiff’s lawyer to the local federal court grievance committee for allegedly violating Rule 4.2. The committee concluded that the plaintiff’s lawyer had not violated Rule 4.2 and recommended that the district court dismiss the ethics complaint. The district court accepted the committee’s recommendation. In doing so, the court observed that *ex parte* communication with a company’s general counsel does not raise the same concerns as an *ex parte* communication with a lay employee, explaining that a general counsel’s “training in the law helps ensure a level playing field of legal expertise in communications with opposing counsel.” *Id.* at *3.

In *State ex rel. Oklahoma Bar Ass’n v. Tweedy*, 52 P.3d 1003 (Okla. 2000), the Oklahoma Supreme Court suspended lawyer Craig Tweedy for violating various rules of professional conduct in prosecuting baseless claims in two separate cases. But one of the alleged offenses for which he was not disciplined was his *ex parte* communication with the general counsel of American Airlines in a case in which American had sued him.

In a nutshell, Tweedy had twice written to American’s general counsel in the course of the litigation: one letter was a settlement demand and the second letter was a long, incoherent, and rambling manifesto. The Oklahoma Bar Association ("OBA") charged Tweedy with violating Rule 4.2 as a result. The OBA came up short in the Oklahoma Supreme Court, however, which held that the OBA did not prove Tweedy violated Rule 4.2 by clear and convincing evidence. Although Tweedy’s correspondence “should have been directed to the firm listed as counsel of record for
the airline,” his communications “were with another attorney, the general counsel for American Airlines.” Id. at 1009. That fact, combined with Tweedy’s status as a party to the litigation, persuaded the court that Tweedy's many offenses did not include a Rule 4.2 violation. Id.

It is true that permitting a lawyer to circumvent outside counsel and deal directly with an in-house lawyer creates the potential for mischief. For example, an opposing lawyer might call an in-house lawyer to seek an accommodation that she knows or suspects outside counsel would not grant. But that prospect is not a problem that Rule 4.2 is intended to address. Moreover, it is reasonable to put the burden of avoiding associated confusion or inconvenience on the in-house lawyer, who can easily refer the opposing lawyer to outside counsel, or who may decline to make a commitment or state a position until she has conferred with outside counsel. Indeed, inside counsel are always free to avoid communications with opposing lawyers by referring them to outside counsel. ABA Formal Op. 06-443, at 3. Cautious outside counsel generally ask inside counsel with whom they work to do exactly that.

According to the ABA’s Standing Committee on Ethics and Professional Responsibility, there are two possible exceptions to the general rule that ex parte communications with inside counsel are permissible. First, if the inside lawyer supervises, directs or regularly consults with the organization’s lawyer concerning the matter, has authority to obligate the organization with respect to the matter, or is someone within the organization whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability, then the prohibition in Rule 4.2 applies. ABA Formal Op. 06-443, at 3.
But that hardly seems right, because then the exception would almost always swallow the general rule. Indeed, it is precisely because an in-house lawyer directs or supervises outside counsel or has the ability to bind the organization that an opposing lawyer wants to communicate with the in-house lawyer, as where outside counsel for the organization is allegedly not communicating settlement offers, refuses to communicate on key issues or is impossible to reach for some reason, or is otherwise acting unreasonably.

Second, if the inside lawyer is herself a party to the litigation or for some reason has independent counsel with respect to the matter and the inquiring lawyer knows of the representation, Rule 4.2 prohibits *ex parte* communication with the inside lawyer. The second exception identified by the Standing Committee makes much more sense.

Another possible exception to the general rule arguably exists where outside counsel asks an adversary not to communicate directly with inside counsel. A communication in disregard of such a directive would not violate Model Rule 4.2, but the Standing Committee has speculated that in this situation *ex parte* contact with inside counsel might violate Model Rule 4.4(a). ABA Formal Op. 06-443, at 2. Model Rule 4.4(a) states that in representing a client, “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

The Standing Committee’s position is untenable, however, because a communication with inside counsel either violates Rule 4.4(a) or it does not, and if a lawyer’s communication with inside counsel has a substantial purpose other than delay, embarrassment, or burden, an outside lawyer’s prior request against it does not change
that fact. Outside counsel have no legal right to prohibit another lawyer’s communications with inside counsel, so ignoring outside counsel’s request cannot violate their legal rights. In-house lawyers are not normally included among the group of employees who may be deemed to personify their organizations for Rule 4.2 purposes, so communication with them cannot reasonably be characterized as a method of obtaining evidence that violates the organization’s legal rights. Consequently, it is difficult to see how legitimate *ex parte* communications with an in-house lawyer would ever give rise to a Rule 4.4(a) violation.

For example, think about a case in which a company’s outside lawyer has asked opposing counsel not to communicate directly with the company’s general counsel. The opposing lawyer reasonably believes that the outside lawyer has not relayed a settlement offer to the company. If the opposing lawyer calls the general counsel about the settlement offer, as Rule 4.2 clearly permits, the outside lawyer’s request that she not make such a call, without more, does not transform it into a Rule 4.4(a) violation.

In conclusion, lawyers generally are permitted to have *ex parte* communications with in-house counsel for organizations that are also represented by outside counsel. If you are representing an organization and want to avoid problems that might flow from your adversary bypassing you and going straight to your client’s general counsel, it is up to you and the general counsel to coordinate your response to any possible approaches. If you want to communicate *ex parte* with an organization’s in-house counsel, on the other hand, think hard. How important or necessary is the communication? After all, there is a possibility that the opposing outside lawyer will respond in a way that will complicate the litigation or that will at least make life
unpleasant for a while. Consider whether any of the possible exceptions to the notion that such communications are permissible may apply and, if so, whether anyone seeking to enforce them reasonably might succeed in doing so. Of course, never knowingly misrepresent anything when dealing with the inside lawyer. At least with respect to your first communication, writing (whether in letter form or by e-mail) rather than calling the inside lawyer lessens the possibility that you will later be accused of related misrepresentations or misstatements.

V. Conclusion

Corporations and their in-house counsel should have heightened sensitivity to ethical issues that can arise in the workplace on a daily basis. In addressing litigation that involves both the corporation and its employees, in-house counsel should exercise care in representing both the corporation and employees and should refrain from representing employees if the interest of the employees and the corporation conflict.

Preservation of the attorney-client privilege is always a significant concern when internal investigations are conducted. The *Upjohn* case provides a useful blueprint for how in-house counsel might interview employees and preserve the attorney-client privilege.

Corporate “Miranda” warnings are worth their weight in gold when corporations conduct internal investigations, and the corporation, its in-house counsel and its employees must be certain in their minds as to whom in-house counsel is representing.

*Ex parte* communications in litigation can be a flashpoint but keep in mind that it is generally permissible for lawyers for a corporation’s opponent to bypass outside counsel and communicate directly with the corporation’s inside lawyers.
Stay attuned to ethical issues day in and day out. Ask questions of yourself. Explore issues. Be intentional. By so doing, ethical minefields can be safely navigated.