Navigating Conflicting Roles: The Ethical Obligations of an Organization's Lawyers Post-*Wells Fargo**

John Rafael Perez, William Stone, and Sarah Weiner**

Introduction

Government-initiated enforcement actions aimed at exposing white-collar crime have proliferated considerably following the recent financial crisis. To get ahead of these investigations, many organizations hire in-house or external counsel to conduct their own preliminary investigations. These internal investigations create significant issues for lawyers who must provide to employees they interview an "*Upjohn* warning"—a disclosure that the lawyer represents *only* the organization and its interests. Lawyers must caution employees that while their communications are protected by the attorney-client privilege, the privilege belongs to the organization, and the corporation may elect to waive the privilege and disclose otherwise protected information to third parties.[1] To date, lawyers have largely confined *Upjohn* warnings to the context of internal investigations. But a recent case, decided by the District Court for the Southern District of New York, raises the possibility that the ethical lawyer should give *Upjohn*-like warnings in a wider variety of day-to-day conversations and consultations.

In *United States v. Wells Fargo Bank, N.A.*,[2] the court held that an employee could not disclose the privileged information necessary to raise an advice-of-counsel defense because the corporation owned the privilege.[3] As a result, *Wells Fargo* poses a corollary question to the one addressed in *Upjohn*. Under *Upjohn*, organizational lawyers must warn employees that the organization may *disclose* privileged information over an employee's objection. After *Wells Fargo*, the question becomes whether organizational lawyers warn employees that the organization may *refuse* to disclose privileged information in response to an employee's legitimate request to do so. This white paper explores the professional ethical repercussions of

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** J.D. Yale Law School (2016); J.D. candidate, Yale Law School (2017 expected); J.D. candidate, Yale Law School (2017 expected), respectively. The authors are student members of the Ethics Bureau at Yale, a legal clinic at Yale Law School supervised by Professor Lawrence J. Fox, the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School. For their time, insight, and meticulous guidance, we are indebted to Professor Larry Fox, Christine Michelle Duffy, Irwin Warren, and the student members of The Ethics Bureau at Yale. All errors are our own.

[1] *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

[2] 132 F. Supp. 3d. 558 (S.D.N.Y. 2015) [hereinafter *Wells Fargo I*]. In fact, the court issued two opinions on the advice-of-counsel issue. *See also* United States v. Wells Fargo Bank N.A., No. 12-CV-7527 (JMF), 2015 WL 3999074, at *1 (S.D.N.Y. June 30, 2015) [hereinafter *Wells Fargo II*]. In the body text, this paper will collectively refer to both opinions as the *Wells Fargo* case.

[3] *Wells Fargo I*, 132 F. Supp. 3d at 563.

the *Wells Fargo* decision and proposes several steps that organizations and their lawyers can take to reckon with the case's implications.

I. *Wells Fargo*, *Upjohn*, and the Obligation to Warn

In *Wells Fargo*, the government brought fraud charges against both Wells Fargo Bank and Kurt Lofrano, one of the bank's vice presidents. Lofrano stated that he relied on the advice of company counsel, but Wells Fargo objected to the disclosure of privileged attorney-client communications.[4] The court issued two important holdings. First, it held that an employee otherwise lacking authority to waive the attorney-client privilege on the corporation's behalf could not do so for the purpose of raising a personal advice-of-counsel defense, stating that "the privilege is not waived by the employee's mere invocation of an advice-of-counsel defense during discovery."[5] Having refused to find an implied waiver, the court then had to decide whether "Lofrano's right to present an advice-of-counsel defense . . . override[s] Wells Fargo's privilege."[6] The court concluded that it did not, explaining that "to hold that Lofrano can pursue his defense over the Bank's objection would 'render[ ] the privilege intolerably uncertain.'"[7]

The *Wells Fargo* holding affirms the longstanding principle that only the party who holds the privilege may waive it through either an explicit or implied waiver.[8] Indeed, this principle appears to hold true despite the tremendous costs it may place on employees' abilities to put forth their best defense.[9] As such, an employee who receives and acts on the advice of organizational counsel would likely be barred from raising an advice-of-counsel defense if the organization refuses to waive attorney-client privilege, even when that defense is the backbone of the employee's case.

Wells Fargo belongs to a long line of cases wherein organizations and their employees diverge on the issue of waiving attorney-client privilege.[10] The most important of these cases is *Upjohn Co. v. United States*. In *Upjohn*, the Court held that organizational counsel's

[4] *Wells Fargo I*, 132 F. Supp. 3d at 560.
[5] *Wells Fargo II*, No. 12-CV-7527 (JMF), 2015 WL 3999074, at *2.
[6] *Wells Fargo I*, 132 F. Supp. 3d at 563.
[7] *Id.* at 564 (quoting Ross v. City of Memphis, 423 F.3d 596, 604 (6th Cir. 2005) (alteration in original)).
[8] Note, however, that because managers are fiduciaries acting on behalf of stockholders, courts may in some cases permit shareholders to discover attorney-client communications between corporate counsel and corporate managers. *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1103–04 (5th Cir. 1970) ("The corporation is not barred from asserting [attorney-client privilege] merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance."); *see also* 1 JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 1:27 (2015) (stating that "*Garner* has become the accepted law" and collecting cases).
[9] Acknowledging that "the Supreme Court did leave open the possibility that 'exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege,'" the *Wells Fargo* Court emphasized that "this case is civil, not criminal, and therefore would not fall within such an exception even if it did exist." *Wells Fargo I*, 132 F. Supp. 3d at 562.
[10] Furthermore, although *Wells Fargo* imagines a for-profit context, its implications extend to non-profit organizations as well.

conversations with employees fell under the attorney-client privilege, but the privilege belonged solely to the corporation, and not the employee. There, "[m]anagers were instructed to treat the investigation as 'highly confidential' and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information."[11] The Court found this disclaimer to constitute sufficient notice to inform the employees that their communications with counsel were privileged and that the employees did not control that privilege. In reaching its decision, the Court explained: "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[12]

The purpose of the *Upjohn* warning is to inform employees that the advice they receive is for the organization and not themselves. The warnings have no statutory basis, and so companies may formulate them in multiple ways. Standard *Upjohn* warnings inform the employee of the following: (a) the lawyer represents the employer; (b) any advice given during the conversation is for the organization and not the employee; (c) the communication is protected by the attorney-client privilege, but that privilege belongs to the organization and not the employee; (d) the organization may choose to waive the privilege and disclose the employee's statements to a third party, including government authorities; and (e) the employee has an obligation to keep the contents of the communication confidential.[13] However, even seemingly watered-down *Upjohn* warnings have been held acceptable so long as employees do not reasonably believe that they have an attorney-client relationship with the organizational counsel. For example, the Ninth Circuit found a warning that the employee was being interviewed "on behalf of" a company sufficient, at least where subsequent conduct by the employees indicated that they were aware that the privilege belonged to the company.[14]

In addition to allowing less formal versions of the *Upjohn* warning in the internal investigation context, *Wells Fargo* and other federal court opinions suggest that *Upjohn* warnings may also be required outside the context of internal investigations. For example, in *In re Kellogg, Brown & Root, Inc.*, the court held that the distinction between talking with counsel for the sake of gaining legal advice and for purposes of complying with a routine regulatory or company policy rested on a "false dichotomy."[15] The court also noted that "a variety of other federal laws require similar internal controls or compliance programs."[16] Indeed, courts may hesitate to draw lines between investigative and non-investigative communications because, as a practical matter, the potential for conflicts of interest will exist in both situations.

II. The Dual Nature of Lawyers' Ethical Obligations

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[11] Upjohn Co. v. United States, 449 U.S. 383, 387 (1981).
[12] *Id.* at 390.
[13] *See* Robert R. Calo et al., Upjohn *Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Individuals,* AM. B. ASS'N (2009), https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf.
[14] United States v. Ruehle, 583 F.3d 600, 609 (9th Cir. 2009).
[15] 756 F.3d 754, 758 (D.C. Cir. 2014).
[16] *Id.* at 762.

Wells Fargo made clear that employees who act in reliance on the advice of organizational counsel may be prevented from raising an advice-of-counsel defense in litigation. Lawyers now have notice that courts may honor an organization's refusal to waive privilege, meaning that reliance on the lawyer's advice might put the employee in legal peril. This raises a series of *Upjohn*-like questions: After *Wells Fargo*, when does an organizational lawyer have an ethical duty to warn? Must organizational lawyers *always* inform employees that they do not represent them and that all succeeding conversations are protected by organizational privilege, or do lawyers have flexibility to decide when such warnings are necessary? What information should the warning contain, and should lawyers advise employees to retain their own counsel?

The organizational lawyers' obligation to warn can be gleaned from the Model Rules of Professional Conduct (Model Rules), which imposes duties on lawyers with respect to both their organizational clients and the individual employees within the organization. The Model Rules set the following standard: An organization's lawyer must warn employees that they are not the lawyer's clients, and that the organization owns the privilege for any succeeding conversations, in situations wherein the lawyer *reasonably believes* that the employee's interests may be or become adverse to the organization's interests. This standard derives from a combined reading of Model Rules 1.13, 4.3, and 1.7.[17]

First, Model Rule 1.13 sets out lawyers' ethical obligations when representing an organizational client. Because an organization cannot act except through its directors, officers, and other employees, counsel's client is "the organization acting through its duly authorized constituents."[18] Lawyers do not, however, represent individual employees in their personal capacity.[19] Thus, "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the 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."[20] The comment to Rule 1.13(f) further explains that this warning should include reminders that "lawyer[s] cannot represent such constituent," "that such person may wish to obtain independent representation," and that lawyers' discussions with "the individual may not be privileged."[21]

The *Wells Fargo* decision sheds light on when organizational lawyers should perceive potential adversity between the organization and employees' interests. Because lawyers must maintain confidentiality of client information, employees may become adverse to the organization whenever employees face personal liability for which they would like to raise an advice-of-counsel defense. In such a situation, the organization may refuse to waive the attorney-client privilege. When lawyers reasonably foresee that such a conflict may arise, they have a

[17] The New York Rules of Professional Conduct have an even more expansive conflict of interest standard that bars lawyers from representing clients with "differing," and not necessarily adverse, interests. N.Y. RULES OF PROF'L CONDUCT r. 1.7(a)(1).
[18] *Id.* r. 1.13.
[19] *Id.* r. 1.13 cmt. 2.
[20] *Id.* r. 1.13(f).
[21] *Id.* r. 1.13 cmt. 10.

duty to remind the employee of the identity of their organizational client and their client's right to prohibit the employee from disclosing any legal advice the organization's lawyers provide.

This interpretation is further bolstered by Model Rule 4.3, which governs lawyers' interactions with unrepresented persons. It states:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer 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. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[22]

This rule clearly requires that, in situations wherein the interests of the organization and an individual employee may potentially conflict, organizational counsel must refrain from giving any indication that would lead such employees to believe that they are represented by counsel. The burden is on lawyers to unambiguously communicate that they represent the interests of the organization and not the employees. This communication should include a reminder that, in any correspondence between the lawyer and the employee, the organization owns the privilege and is the sole entity that may waive it.

Failure to clarify the identity of an organizational counsel's client not only violates a lawyer's duties to unrepresented employees, but also may violate a lawyer's obligations to their organizational clients. Of course, employees' interests will not always clash with organizational interests; oftentimes, interests will align.[23] However, when organizational counsel can reasonably foresee a potential conflict, they must adequately dispel an employee's perception that a lawyer-client relationship has been formed. Otherwise, they risk unwittingly creating an "accidental client" based on the employee's detrimental reliance.[24] Taking on an accidental client can violate a lawyer's ethical obligations to their organizational clients if the new employee-client's interests are adverse to the interests of the organization. Indeed, the Model Rules prohibit a lawyer from taking on a representation that involves a concurrent conflict of interest—a situation in which "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[25]

In sum, the discussed Model Rules converge to impose an obligation on organizational lawyers to warn employees that the lawyers represent the organization, not the employee, whenever lawyers reasonably believe the employee's interests may be or become adverse to the

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[22] *Id.* r. 4.3.

[23] *See* Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 939 (2005).

[24] *See id.* at 938.

[25] N.Y. RULES OF PROF'L CONDUCT r. 1.7.

organization's. This adversity arises because the organization may refuse to waive attorney-client privilege despite the employee wishing to waive it for the purpose of raising an advice-of-counsel defense.

III. Recommendations for Organizations and their Lawyers

The failure to give an adequate warning could have serious consequences for both lawyers and her organizational clients. Lawyers may face state bar disciplinary proceedings and/or malpractice liability, and employers may suffer the attendant reputational (and potentially financial) costs of their lawyers' professional misconduct. Importantly, disciplinary and civil malpractice proceedings would progress separately from the original litigation, and the failure to warn does not *necessarily* affect the organization's ability to control disclosure of the privileged communication.[26] However, if the failure to warn creates an accidental client, then the employee can assert her own attorney-client privilege. Furthermore, if corporate counsel accidentally forms a lawyer-client relationship with the un-warned employee, then counsel would need to withdraw from *both* representations in order to avoid concurrent representation of adverse clients.[27]

That said, identifying the existence of an ethical obligation to warn in theory leaves many questions open in practice. Organizational lawyers provide advice to employees in a variety of contexts, and it would not be practical or advisable for lawyers to begin each and every interaction with a warning. At least in certain contexts, requiring a warning before every consultation might deter employees from sharing information with organizational counsel. As the Supreme Court has recognized, these consultations are essential because they allow "the advocate and counselor to know all that relates to the client's reasons for seeking representation [so that] the professional mission [can] be carried out."[28] Furthermore, "full and frank communication between attorneys and their clients . . . promote[s] broader public interests in the observance of law and administration of justice."[29] Thus, *Wells Fargo* exposes a central irony that plagues the attorney-client privilege in the organizational context—the very privilege that is supposed to encourage employees to talk with counsel also threatens to chill such interactions.

The need to balance counsel's obligations to both the organization and individual employees prevents the mechanical application of cookie-cutter rules. Rather, the proper approach is structural, involving effort along two dimensions. First, by drawing on institutional memory and building organizational capacity, counsel should proactively identify situations that require warnings and clearly communicate those warnings when appropriate. Second, to protect both the organization and its employees in situations where the need for a specific warning was not anticipated, organizational lawyers must foster a culture of notice through the organization's daily business practices and employee training.

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[26] United States v. Ruehle, 583 F.3d 600, 612-13 (9th Cir. 2009).
[27] *See* Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917, 944-45 (2008).
[28] Trammel v. United States, 445 U.S. 40, 51 (1980).
[29] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

A. Giving Specific Warnings to Employees

The organizational lawyer's first task is to determine when a warning is appropriate. On one hand, lawyers understand that there is an ethical obligation to clarify the existence and scope of representation unambiguously. On the other hand, lawyers should also be aware that excessive warnings could damage rapport and have a chilling effect on employees, making them less willing to seek or accept counsel's advice. As the analysis above has indicated, ethical rules require that lawyers clearly warn an employee when they reasonably believe that the interests of the employee and the organization may be or become adverse to one another in the matter consulted upon. However, consultations with organizational counsel may lead to both organizational and individual liability in many situations. As such, the important task is to determine when the interests of the organization and the individual would not align in cases wherein both are sued for an alleged wrongdoing. To make this complex determination reliably, companies must engage in capacity-building efforts involving dialogue among employees, information gathering, and extensive record keeping.

Based on their professional experiences, lawyers have a general sense of the types of issues that are more likely to result in adversity between the organization and the individual employees. Some examples of these issues include individual acts of corruption or managerial employment discrimination against specific groups of employees. By collecting this information from practicing lawyers, looking into the organization's specific history and institutional practice, and examining relevant case law and government investigation histories, organizations and their lawyers should work together to build a repertoire of potentially risky scenarios that are more likely to lead to conflicts. Furthermore, lawyers should dutifully record this information to aid institutional memory and serve as a reference for other organizational lawyers faced with similar dilemmas.

Once an organizational lawyer determines that a warning is necessary, she must clearly issue the warning before the employee reveals any information or receives any advice. The warning should include the following components:

1. Counsel represents the organization and not the employee.
2. The employee's communications with the lawyer are protected by the attorney-client privilege.
3. The privilege belongs solely to the organization and not to the employee.
4. Only the organization may waive the privilege in order to disclose the contents of the communication to third parties in any subsequent proceeding.
5. The employee will not be notified if the privilege is waived.
6. The employee must keep confidential the information discussed, even if the employee later wants to say it relied on counsel's advice.
7. The employee should consider securing separate, individual representation.

Organizational lawyers should memorialize the giving of the warning, for example, by requiring the employee being interviewed to date and sign a form before proceeding with the communication.[30] This memorialization serves two purposes. First, it provides the organization and employee with written evidence of notice, which is useful in future investigations and hearings. Second, the formality of the approach gives employees the opportunity to read the warning carefully and weigh the benefits and risks of continuing the communication.

B. Developing an Organizational Culture of Notice

Legal discretion is, of course, imperfect. Situations will inevitably arise, especially in the capacity-building stage, wherein lawyers reasonably believe that an organization and its employees will not develop interests adverse to one another but unexpected events later create an unforeseen conflict. It is very hard for lawyers to remedy this type of situation satisfactorily after-the-fact. As such, it is critical that lawyers cooperate with organizations to *prospectively* equip employees with knowledge of *Wells Fargo*'s implications through educational structural and policy adjustments. Giving employees a degree of control over how they choose to communicate with lawyers is the best safeguard to maintaining the delicate balance between their interests and the organization's.

The first step towards establishing an ethical culture of notice is to provide information and training to every employee as part of the onboarding process. This is especially necessary for key employees who will be heavily involved in organizational decision-making. First, employees must be made aware of a relevant section on legal representation in their employee handbook and should also be provided with a memorandum on the scope of legal representation in their onboarding packets. Furthermore, employees could be required to attend introductory training sessions that mirror routine orientation lectures already provided by many organizations. These sessions should emphasize the implications of *Wells Fargo* and may employ a variety of learning tools such as simulations, lectures, videos, and hands-on exercises. Of course, current employees hired before the onboarding program's launch should retroactively receive the same training and resources so that information is freely, fully, and continuously disseminated.

The efforts should not end, of course, at the beginning of an employee's tenure at the organization. Organizations and their lawyers should collaborate to periodically remind employees of the nature and scope of organizational counsel's representation. Such a reminder can be accomplished through the circulation of internal memoranda or company-wide e-mails. Organizational counsel may also arrange short seminars and workshops wherein employees are allowed to speak candidly with the organization's lawyers about representational issues in a variety of legal scenarios. The benefits of such seminars would be two-fold. First, they would foster more open discussions about organizational lawyers' roles and relationship with individual employees. Second, the seminars would also serve as a forum for lawyers to build rapport and trust with the organization's employees.

[30] *See, e.g.*, United States v. Nicholas, 606 F. Supp. 2d 1109 (C.D. Cal. 2009).

It is imperative that the aforementioned seminars, trainings, and informational materials be tailored to specific employees' functions, seniority levels, and decision-making roles within the organization. Indeed, the legal issues facing a manager are far more numerous than and fundamentally different from the issues facing entry-level employees. As such, managers would likely need additional and extended sessions. Similarly, training should increase in the wake of major changes in the law, such as *Wells Fargo* and *Upjohn*, as well as major events in the organization, such as a government investigation or enforcement action. Finally, employees, especially managers and officers, should be constantly alerted to the option of seeking individual representation in areas of high legal complexity and risk.

To be sure, creating an organizational culture of notice will require an investment of institutional resources—but the benefit is worth the cost. Most importantly, all lawyers have an obligation to comply with applicable rules of professional conduct, even when compliance costs time and money. Second, and more directly relevant to an organization's bottom line, building a culture of notice will help prevent the creation of accidental clients and insulate the organization against litigation concerning a former employee's putative advice-of-counsel defense. Lastly, clearly communicating the organizational counsel's role will help build trust between employees and an organization's lawyers, ensuring that both groups can more effectively and efficiently support each other's work.

IV. Conclusion

Wells Fargo clearly exposes the challenges facing lawyers in the context of organizational representation. Specifically, lawyers must serve as effective and zealous advocates for their organization while simultaneously honoring their ethical duties to unrepresented employees. As this white paper has discussed, lawyers must craft creative solutions to prevent the negative consequences of a *Wells Fargo* dilemma. Specifically, they should strive to institute small structural changes that (1) aid in the prediction of potential adversity between organizational and individual interests and (2) foster a culture of notice and information regarding the scope of legal representation.