

# The Consequences of the Failure of Corporate Counsel to Give *Upjohn* Warnings to Corporate Employees

Corporate counsel, by his or her status, represents the corporation and not its officers, board members or employees. The same is true if the business entity is a partnership or limited liability company — the attorney, merely by his or her status as counsel to the entity, is not automatically counsel to its partners, members or employees. There are many instances where the attorney does become counsel to the entity's people in what is referred to as an "agency representation" — that is, counsel represents both the entity and the entity's person, whether that be an officer, board member, partner, member or employee. Nevertheless, the attorney/client privilege is held by the entity, not the individual, so that anything stated by the individual to the attorney can be conveyed by the attorney to those who govern the entity. Therefore, the entity, through those who control it, can decide to waive the privilege, regardless of the individual's wishes.

Beginning with the U.S. Supreme Court's holding in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), a line of cases has developed recognizing that under certain circumstances, corporate counsel owes a duty to the entity's employee to explain that, although counsel is representing the employee, the attorney/client privilege belongs to the entity and not the individual. Over time, these warnings have been coined the *Upjohn* warnings. See, e.g., *In re Condemnation by City of Philadelphia in 16.1616 Acre Area*, 981 A.2d 391, 396 (Pa. Comm. 2009). The failure of counsel to give *Upjohn* warnings can have grave consequences, as a pair of recent reported decisions in a high-profile case demonstrate.

In *Commonwealth v. Schultz*, \_\_\_ A.3d \_\_\_, 2016 WL 285506 (Pa.Super.) and *Commonwealth v. Curley*, \_\_\_ A.3d \_\_\_, 2016 WL 285707 (Pa.Super.), a Penn State employee and a retired Penn State employee were subpoenaed to testify before the grand jury that was investigating the Jerry Sandusky scandal. Both Schultz and Curley, at different times, met with Penn State's then general counsel (GC) in preparation for their appearances before the grand jury. The university GC advised each "that, as a grand jury witness, he was entitled to an attorney who could attend and consult with him during his testimony." To each "[the university GC] explained that he was free to retain a dif-

ferent attorney, but she could also represent him at the proceeding as well." Also, according to the school's GC, she informed each "that she was general counsel for Penn State and that any information he told her was not confidential because she was the University attorney and could relate the information to the Board of Trustees," although she never did. The university GC also told each that, in her view, there was no conflict in her representing both of them, as well as the president of the university and the university itself.

What the school's GC did not relate to either, in the Superior Court's view, was critical. She did not advise them of their Fifth Amendment right against self-incrimination, which they would be losing if she represented them because the privilege would be held by the university and not by them. She "also did not carefully elucidate the difference between representing [the employee] in his individual capacity or as an agent of his employer [or former employer], Penn State." In short, in the Superior Court's view, the school's GC had failed to give full and complete *Upjohn* warnings.

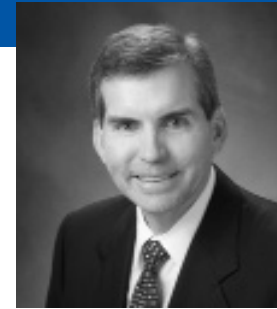
After the university GC gave her advice, the Office of Attorney General (OAG) individually interviewed Schultz and Curley with the university GC present. After these interviews, but before either actually testified, it is alleged that the university GC asked the assistant attorney general whether either Schultz or Curley "were targets of the criminal investigation," and she was told not, notwithstanding that the OAG allegedly did have evidence of their possible criminal conduct.

Both Schultz and Curley testified before the grand jury, with the university GC in attendance. When the presiding judge asked who was representing them, the university GC stated her name and identified herself as "general counsel for Pennsylvania State University." When she was asked, "[W]ill you be providing representation for both of those identified witnesses?[]" she stated: "Gary [Schultz] is retired but was employed by the University and Tim [Curley] is still an employee." As the Superior Court notes, the university GC "did not expressly state that she represented [each] solely in an agency capacity, nor did she indicate that she did not represent [each] in his individual capacity." Moreover, "[t]he OAG did not express concern on the record over a potential conflict of interest based on [the university GC] appearing with both. ..."

The presiding judge then advised both individuals of certain rights they held as grand-jury witnesses, including "the right to the advice and assistance of a lawyer." But he requested no further clarification from the university GC with respect to the nature of her representation of the individuals.

When Schultz and Curley began their testimony, they were asked by an assistant attorney general to identify their

## Avoiding Liability



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counsel. Both identified the university GC as their counsel. The university GC, however, did not indicate to the witnesses that the scope of her representation was in any way limited.

The grand jury later recommended that the OAG charge both Schultz and Curley with perjury and failure to report suspected child abuse. The OAG filed a criminal complaint against both, who thereafter retained new counsel, who notified the university GC that Schultz and Curley did not waive their attorney/client privilege for any communications between them and her. In response, the university GC denied the existence of any attorney/client privilege between either Schultz and Curley and her because "she was counsel for Penn State, that she had asserted that she was counsel for Penn State, that she had acted solely in an agency capacity in representing [the individuals], and that she did not represent [them] in an individual capacity before the grand jury."

The OAG thereafter sought the testimony of the university GC before the grand jury with respect to private conversations between her and Schultz and Curley. Penn State retained new general counsel who wrote the presiding judge to state that the school waived the privilege for itself with the exception of conversations between the previous GC and Schultz and Curley. At a subsequent conference with the presiding judge involving counsel, including counsel for the former university GC but not counsel for Schultz and Curley, the issue was seemingly sidestepped when the assistant attorney general promised not to ask any questions that would delve into the communications that were claimed to be privileged.

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The former university GC did testify about the communications in question. And although her counsel was present and could object, Schultz's and Curley's counsel were not permitted to attend per state law, and so no one was present to object on their behalves when the former university GC was asked about communications between her and Schultz and Curley. Her testimony led to further criminal charges against both individuals.

Thereafter, both individuals filed pretrial motions to preclude the former university GC's testimony and to dismiss the charges. Both individuals argued that the presence of agency counsel did not satisfy their statutory right under the Pennsylvania Grand Jury Act to counsel when testifying before a grand jury. The trial court denied both motions and an appeal was immediately taken.

A unanimous three-judge panel of the Superior Court reversed. It found that there

was not a "knowing, intelligent, and voluntary decision whether to continue communicating with corporate counsel" where corporate counsel has failed to "clarif[y] the potential inherent conflict of interest in representing the corporation and an individual and [failed] to explain ... that the attorney may divulge the communications between that person and the attorney." The court held that this concept is "all the more essential where the purpose of the individual seeking advice relates to an appearance and testimony before a criminal investigating grand jury." In that court's view, until this concept has been explained, the client cannot give informed consent and the scope of the attorney's representation has not in any way been limited until the client has given such consent. As a result, the court found that Schultz and Curley were "constructively without counsel" when they testified before the grand jury because they were not provided "informed consent as to limited representation." The consequence of that finding

was the conclusion that their right against self-incrimination, which is personal in nature, was not protected by agency representation. Moreover, the court noted that the university had not waived its privilege with respect to communications between its GC and its agents and that the discussions did not involve "general business matters related to the operation of the University, but pertained to the criminal investigation into Jerry Sandusky."

Based upon this analysis, the court found that the former university GC was not competent to testify and, as a result, her "grand jury testimony was improper." Therefore, the appropriate remedy, in the court's view, was to quash the criminal charges that arose from the grand-jury presentment that resulted from the former university GC's testimony.

But the court did not stop there in its criticism. The court also reproached the prosecutor for misleading the trial judge "by

claiming that the Commonwealth would not inquire into matters concerning [the former university GC's] communications with Schultz, Curley, and [the university's president]" when in fact he did. The court also noted that the supervising judge did not "colloquy Schultz regarding any potential issue relative to [the former university's GC] representing Schultz in a non-individual capacity."

These decisions graphically illustrate the importance of corporate counsel making full and complete *Upjohn* warnings to those whom he or she intends to represent in an agency and not a personal capacity. The failure to do so in this instance prompted criminal charges to be tossed and unnecessary time and expense to be incurred. The first and most important question for any lawyer, including corporate counsel, is, "Who is my client?"