**THE YATES’ MEMORANDUM REGARDING INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING: NEW BEST PRACTICES FOR GLOBAL INVESTIGATIONS**

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On September 9, 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum entitled “Individual Accountability for Corporate Wrongdoing” (the “Yates Memo”).[[1]](#footnote-1) The Yates Memo establishes “six key steps” Department of Justice (“DOJ”) civil and criminal prosecutors should take to enhance the DOJ’s effort to “fully leverage its resources to identify culpable individuals at all levels in corporate cases”:

* (1) Corporations will be eligible for cooperation credit only if they provide DOJ with “all relevant facts” relating to all individuals responsible for misconduct, regardless of the level of seniority;
* (2) Both criminal and civil DOJ investigations should focus on investigating individuals “from the inception of the investigation;”
* (3) Criminal and civil DOJ attorneys should be in “routine communication” with each other, including by criminal attorneys notifying civil counterparts “as early as permissible” when conduct giving rise to potential individual civil liability is discovered (and vice versa);
* (4) “Absent extraordinary circumstances,” DOJ should not agree to a corporate resolution that provides immunity to potentially culpable individuals;
* (5) DOJ should have a “clear plan” to resolve open investigations of individuals when the case against the corporation is resolved; and
* (6) Civil DOJ attorneys should focus on individuals as well, taking into account issues such as accountability and deterrence in addition to the ability to pay;

The guidance in the Yates Memo applies to federal civil and criminal prosecutors – it does not apply directly to legal entities or individuals. Nonetheless, the guidelines state expectations for what a corporation must do to receive cooperation credit from the DOJ in future investigations.[[2]](#footnote-2) In Section I below, we summarize our key takeaways from the Yates Memo. In Section II below, we make specific recommendations that XYZ Company may wish to evaluate to ensure that pertinent investigative and reporting writing policies, procedures and practices take the Yates Memo into account.[[3]](#footnote-3)

To summarize our recommendations: We recommend that XYZ Company: (A) evaluate having its attorneys and investigators use standardized and enhanced *Upjohn* warnings; (B) evaluate supplementing the *Upjohn* warning with specific advisements when interviewing XYZ Company associates whose underlying conduct the company believes may place associates in conflict with XYZ Company; and (C) evaluate potential changes to investigative and report writing policies, procedures and practices to strike the appropriate balance between the need to protect the attorney-client privilege and work product doctrine protections and the desire to conform to expectations stated in the Yates Memo and other government guidelines.

**I. Key Takeaways**

*The Yates Memo Should Be Read In Conjunction with the Filip Factors.* DOJ’s efforts to articulate prosecutorial policies concerning corporate and individual liability are not new. They began in 1999 when then-Deputy Attorney General Holder issued a memorandum entitled “Bringing Criminal Charges Against Corporations.” DOJ’s corporate prosecution policies continued to evolve over the following decade with the Thompson Memorandum (2003), the McNulty Memorandum (2006), and finally the Filip Memorandum (2008). The various policy statements that culminated with the Filip Memorandum were then “codified” in the U.S. Attorney’s Manual, as the “Principles of Federal Prosecution of Business Organizations” (referred to here as the “Filip Factors”) (USAM 9-28.000 et seq.).

The Yates Memo directs that revisions be made to the Filip Factors.[[4]](#footnote-4) And indeed these two documents are at tension with one another in at least some respects. These tensions are explored further in the discussion below.

*The Yates Memo Adopts an “All Or Nothing” Approach to Cooperation*. The most important new guideline for corporations is the first one. To qualify for any cooperation credit whatsoever, in both DOJ criminal and civil enforcement matters, a corporation must at the threshold provide DOJ with all relevant facts about the individuals involved in corporate misconduct. This guideline represents a departure from the Filip Factors. The Yates Memo explicitly states that it is no longer possible to obtain any cooperation credit without disclosing relevant facts about culpable individuals. With this new guideline DOJ is pivoting away from what some perceived to be a practice of reaching corporate resolutions with large fines in lieu of pursuing individual employees or officers for civil or criminal liability.

*The Yates Memo May Require Greater Coordination With Federal Prosecutors*. The Filip Factors expressed a desire to minimize the disruption an outside investigation causes to a corporation’s operations.[[5]](#footnote-5) For that reason, it encouraged prosecutors to take advantage of corporate cooperation as a means to streamline its investigation. In contrast, the Yates Memo assigns to prosecutors an active role in conducting their own investigation. No longer will prosecutors sit back and wait for periodic reports concerning the progress of the company’s internal investigation. The new policy also contemplates that corporate cooperation may continue even after the corporation resolves its case with the DOJ. All of these considerations signal that when cooperating with the DOJ a corporation should expect greater and longer-lasting disruption to business operations.

In her speech announcing the new guidelines the Deputy Attorney General made passing reference to the timing of cooperation. She noted that if law enforcement is alerted early to potential individual misconduct it can use law enforcement techniques, e.g., wires, to help build its case. [[6]](#footnote-6) The Yates Memo does not itself elaborate on this point, although it stresses in several places the need for prosecutors to focus on individuals from the inception of the investigation and the need for civil and criminal attorneys to routinely communicate with one another.

*The Yates Memo May Increase The Likelihood of Privilege and Work Product Waivers*. As the Filip Factors acknowledge, corporations often conduct internal investigations under the protections of the attorney-client privilege and work product doctrines. The Yates Memo requires, however, that to receive any consideration for cooperation, the “company must completely disclose to the Department all relevant facts about individual misconduct.” In a subsequent speech, the Justice Department’s Assistant Attorney General for the Criminal Division elaborated that this guidance requires a company to disclose all relevant facts – “to which it has access” – relating to the misconduct at issue, including all facts about the individual responsible for the misconduct.[[7]](#footnote-7) Deputy Attorney General Yates remarked that this policy means “[n]o more picking and choosing what gets disclosed.” Though the Justice Department has said that the Yates Memo does not alter DOJ policy forbidding prosecutors to request a corporate waiver of privilege, it nonetheless puts strain on those protections, particularly in the case of interview notes taken by an attorney or a non-attorney investigator acting at the attorney’s direction. Interview notes are ordinarily protected by at least the work product doctrine. Yet to the extent those notes form part of what the Yates Memo considers “all relevant facts” bearing on an individual’s culpability, a company may have to waive those protections and share the interview notes with DOJ if it seeks any cooperation credit.

*The Yates Memo Adds Pressure on Companies To Conduct Thorough Investigations*. The Yates Memo’s emphasis on disclosing all relevant facts about individual wrongdoing may lead companies to conduct increasingly more comprehensive – and expensive – internal investigations. Again, the Justice Department cautions that it does not intend for the Yates Memo to drive up the cost of internal investigations. But at least two reasons exist to believe the Yates Memo may have that unintended effect. First, Deputy Attorney General Yates has set the expectation that if the corporation does not know who is responsible for misconduct, “they will need to find out.”[[8]](#footnote-8) In other words, the corporation may have to dig deep into the facts to identify individual wrongdoers if it wishes to receive any cooperation credit. Second, the Filip Factors treated the corporation’s cooperation as a resource-saving device – corporate cooperation conserved federal investigative and prosecutorial resources.[[9]](#footnote-9) In contrast, the Yates Memo suggests the DOJ may take a more active role. In her September 9th speech, Deputy Attorney General Yates said that “Department attorneys will be vigorously testing information provided by companies and comparing it to the results of our own investigation to ensure that it is indeed complete and that it doesn’t seek to minimize the role of any one person or group of individuals.”[[10]](#footnote-10) Two weeks later, Assistant Attorney General Caldwell remarked that DOJ intends to “carefully scrutinize and test a company’s claims that it could not identify or uncover evidence regarding the culpable individuals, particularly if we are able to do so ourselves.”[[11]](#footnote-11) This added outside scrutiny of the sufficiency of the corporation’s internal investigation may cause corporations to devote more resources to the internal investigations process.

*The Yates Memo Creates Added Risks of Conflicts Between the Company and Its Employees*. The Yates Memo guidelines encourage prosecutors to pursue criminal and civil charges against culpable individuals at all levels of the company. In the past, prosecutors may not have pursued fines and other penalties against low and even mid-level employees because they lacked the ability to pay. The guidelines urge civil and criminal prosecutors to look beyond the individual’s ability to pay in determining whether to proceed. The result is that even the most mundane low-level internal investigative interview poses a heightened risk of civil or criminal liability to an employee who may have been involved in wrongdoing. This heightened risk increases pressure on the investigator to ensure that employees at all levels of the company receive an adequate *Upjohn* warning.[[12]](#footnote-12) Statements by an investigator that may in the past have been used to reassure a low-level or unsophisticated employee – *e.g.*, “no one is accusing you of doing anything wrong” – run the danger of giving a false assurance that undercuts the effectiveness of the *Upjohn* warning.

Concerns about the sufficiency of *Upjohn* warnings are magnified when interviewing higher-level employees and corporate officers. A stated goal of the Yates Memo is to “increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy.”[[13]](#footnote-13) In other words, the Yates Memo puts a target on the back of higher-level employees and officers. Indeed, it is foreseeable that higher-level employees and officers whose conduct is within the scope of the investigation may increasingly refuse to cooperate in internal investigations on the advice of separate counsel.

*The Yates Memo May Expand the Purpose of Internal Investigations*. In the past, an internal corporate investigation functioned as a kind of self-critical evaluation. The company conducts the investigation to determine if it, as a company, has engaged in wrongdoing, and if so what business or legal actions should be taken to correct and/or self-report the company’s wrong-doing. Past investigations were certainly concerned with identifying culpable actors, but mainly so that the business could make appropriate employment decisions.

The Yates Memo’s emphasis on reporting individual wrongdoing as a “threshold” requirement for being eligible for cooperation credit changes things. In a sense, the Yates Memo mandates that corporations report wrongdoing by corporate employees if seeking cooperation credit.

The post-Yates Memo internal investigation thus increases the risk of early conflict between the company’s interests and those of its employees, officers and directors. The increased potential for conflicts creates added risks for the corporation. For example, it is common for corporations to retain counsel to represent a corporation and an individual employee in connection with government investigations. However, these joint representations could compromise the company’s ability to later seek cooperation credit if a conflict arises between the company and the associate.

The increased potential for conflicts also creates added risks for employees. Another name for an *Upjohn* warning is a “Corporate *Miranda*” warning – a phrase that likens a corporate investigative interview to a custodial interrogation conducted by police.[[14]](#footnote-14) The analogy may be more apt now than ever. If a corporation seeks to preserve at least the option of cooperation credit it has an incentive to ferret out and report to the government wrongdoing by individuals. For the employee whose conduct is at issue, this sort of investigative targeting may feel coercive. A rank-and-file employee may rely on a bi-weekly payroll check to make ends meet and thus feel he or she has no alternative but to consent to the interview or risk losing his or her job. If, in the course of the interview the associate makes incriminating statements, and those statements are later shared with federal prosecutors, the associate may later question the fairness of having required the employee to make a “Hobson’s Choice.”

**II. Recommendations to XYZ Company In Light of the Yates Memo**

Based on the discussion set forth above, we describe below some recommendations that XYZ Company may wish to evaluate. Several of these recommendations would merely formalize what [XYZ Company’s investigative unit] is already doing. Others may represent a departure from existing practices and require further thought and evaluation.

A. Enhanced Policies Concerning *Upjohn* Warnings.

1. *The Contents of an Upjohn Warning Should Be Standardized*. [XYZ Company’s Investigative Unit] might wish to evaluate for adoption a version of the ABA White Collar Crime Committee’s model *Upjohn* warning.[[15]](#footnote-15) To take into account the Yates Memo, XYZ Company attorneys and investigators might provide a slightly modified version of the model *Upjohn* warning prior to commencing the interview process:

I am a [lawyer/investigator acting at the direction of counsel] for XYZ Company. I represent only XYZ Company, and I do not represent you personally.

I am conducting this interview to gather facts in order to provide legal advice to XYZ Company. This interview is part of an investigation to determine the facts and circumstances [describe briefly subject of investigation] in order to advise XYZ Company how best to proceed.

Your communications with me are protected by the [attorney-client privilege/ work product privilege]. But this privilege belongs solely to XYZ Company, not you. That means XYZ Company alone may elect to waive the privilege and reveal our discussions to third parties. XYZ Company alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, without notifying you, and to gain favor.

In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your attorney, you may not disclose the substance of this interview to any third parties, including other employees or anyone outside the company. You may discuss the facts of what happened but you may not discuss this discussion.

Do you have any questions?

Are you willing to proceed?

The warning may be given orally but we recommend that the warning be given from a written statement to ensure that interviewees receive a legally defensible and uniform *Upjohn* warning.[[16]](#footnote-16)

*Rationale*: As discussed above, we believe the Yates Memo heightens the potential for conflicts between individual associates and the company in internal investigation matters. As a result, we believe it is appropriate and timely to standardize the *Upjohn* warnings customarily given to associates in the course of GI investigations. Creating a record that a standardized *Upjohn* warning was given can help protect corporate counsel against ethics allegations and avoid assertions by interviewees that they too hold the privilege and elect not to waive it.[[17]](#footnote-17)

We recognize it is awkward for an XYZ Company investigator to give an *Upjohn* warning – *Upjohn* warnings are usually given by counsel, not investigators acting at the direction of counsel. Nonetheless we believe it is essential that the GI investigator give an *Upjohn* precisely because the attorney-client privilege extends to the same degree as it would if the attorney himself or herself was conducting the investigation.[[18]](#footnote-18)

2. *No Assurances or Advice*. If an associate expresses concern about going forward with an interview and seeks advice, an XYZ Company lawyer or investigator may advise the concerned associate that he or she is entitled to seek the advice of counsel. Apart from that, an XYZ Company lawyer or investigator should not counsel an individual employee whether he or she needs counsel or whether his or her interests are in fact in conflict with XYZ Company’s.

*Rationale*: XYZ Company lawyers and investigators cannot answer the question: “Do I need a lawyer?” “The [associate] may be entitled to separate counsel, but corporate counsel should not opine on whether separate counsel is necessary.”[[19]](#footnote-19) These are especially important limitations to observe because the Yates Memo heightens what some may perceive as an inherent conflict between the corporation’s interests in pursuing an internal investigation and those of individual employees.

3. *Scrupulously Document the Giving of the Standardized Upjohn Warning*. The fact that the *Upjohn* warning was given, and its contents, should be contemporaneously documented in the XYZ Company Investigator’s notes of interview.

*Rationale*: The failure to document the *Upjohn* warning was one of the root mistakes made by the attorneys conducting the internal investigation in *Ruehle*. They failed to make a clear written record of what warnings had been given and the timing of the warnings.

4. *Refusals to Cooperate*. If an employee asks the consequences of refusing to cooperate, the employee should be referred to the XYZ Company’s Global Statement of Ethics. In pertinent part, the Global Statement of Ethics provides that every associate as the responsibility to “Cooperate with XYZ Company investigations and report all information truthfully.” To avoid accusations of coercion, the XYZ Company attorney or Investigator should also inform the concerned employee that he or she is free to consult with her own counsel prior to being interviewed.[[20]](#footnote-20)

*Rationale:* Legal guidance encourages corporate counsel to refer concerned employees to the company’s policies and to advise employees of their right to separate counsel where appropriate.[[21]](#footnote-21) Corporate counsel should nevertheless be careful to avoid going further so as not to violate ethical rules.

5. *When Conflicts Arise*. If in the course of an interview, a XYZ Company attorney or investigator learns facts that cause the investigator to believe that the interests of the associate and XYZ Company conflict, *e.g.*, the associate unexpectedly implicates herself in criminal wrongdoing, the investigator should suspend or pause the interview and contact the assigned lawyer for further guidance.

*Rationale*: Even outside the context of joint representations, legal guidance suggests attorneys should consider advising corporate employees when counsel believes a conflict of interest currently exists.[[22]](#footnote-22) The situation is a difficult one, however, because XYZ Company could later be faulted for shutting down an interview to avoid learning or confirming bad facts. For these reasons, we believe the XYZ Company investigator should suspend (rather than terminate) the interview and seek guidance from an XYZ Company lawyer about how to proceed.

B. Advisements to Subjects/Targets of the Internal Investigation.

1. *Consider Policies Defining When Conflicts Exist*. The use of the terms “target” and “subject” are unique to federal grand jury practice. Generally speaking, a “target” of an investigation is someone about whom the government has substantial evidence linking the person to the commission of crime. A “subject” of an investigation is a person whose conduct is within the scope of the government’s investigation. A witness is someone who may have relevant background or other knowledge but whose conduct is not the subject of the investigation.

These terms do not apply with precision to an internal investigation conducted by a corporation. A corporation does not “target” an employee as part of an internal investigation. However imperfect they may be, these terms nonetheless provide a way to think about how to categorize employees who are interviewed as part of an internal investigation. As discussed, if a corporation seeks cooperation credit, it must disclose relevant facts concerning individual wrongdoers. This requirement introduces an adversarial quality – a potential conflict – when interviewing potentially culpable employees. XYZ Company should evaluate whether to modify its policies to describe the circumstances when an individual associate is deemed to be a subject of an internal investigation.

*Rationale*: A policy directing XYZ lawyers and investigators to categorize potentially culpable employees would facilitate early decisions about what, if any, supplemental *Upjohn* warnings and/or advisement of rights should be given to such employees.

2. *Consider Providing Supplemental Warnings to Certain Categories of Associates*. When subpoenaing a target or subject to appear before the grand jury the DOJ provides an advisement of rights.[[23]](#footnote-23) In the case of targets, the DOJ goes further and alerts the individual that his or her conduct is being investigated for possible violations of federal law. These advisements are not necessary in a private corporate setting. But as discussed above we believe the Yates Memo heightens the risk of potential conflict between the company’s objectives in an internal investigation – which may include seeking favor with the DOJ by identifying individual bad actors – and the individual associate’s interests. As a matter of basic fairness to the associate, and to avoid potential ethics complaints, XYZ Company may want to evaluate whether to provide supplemental *Upjohn* warnings to “subjects” and/or “targets” of an internal investigation.

*Rationale*: Particularly where an employee is suspected of wrongdoing, corporate counsel should diligently guard against giving the employee any basis for believing he or she is jointly represented by corporate counsel. While carefully documented *Upjohn* warnings will ordinarily be sufficient, a belt-and-suspenders approach may be advisable where there is reason to believe the employee could be subject to individual liability. For example, in *Ruehle*, the trial court found joint representation where the corporate officer reasonably believed he was represented by counsel and where, although counsel testified that they provided an *Upjohn* warning, there was no written record and the officer did not recall receiving one.

C. Additional Recommendations.

1. *Absent Unusual Circumstances Avoid Joint Representatio*ns. Given that the Yates Memo requires corporations to disclose all relevant facts to be eligible for *any* cooperation credit, joint representations are very risky. The jointly represented employee could disable the company from providing relevant facts by asserting his or her privilege. Joint defense agreements pose similar risks. Accordingly, joint representations and joint defense agreements should be avoided unless: (a) XYZ Company has conclusively determined it will not seek cooperation credit under the terms of the Yates Memo; or (b) as a condition of the joint representation or joint defense agreement, the employee agrees that XYZ Company can waive the privilege and can reveal information to third parties, including information obtained from the employee.

*Rationale*: DOJ guidance recognizes that a corporation may be “disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government [,] thereby limiting its ability to seek … cooperation credit.” U.S.A.M. 9-28.730. To avoid this scenario, the DOJ suggests that corporations may wish to craft such agreements, to the extent they choose to enter them, to preserve the “flexibility” to disclose facts over the individual’s objection. *Id.*

2. *Evaluate the Feasibility of Policies That Protect the Attorney-Client Privilege and Work Product and Comport with the Yates Memo*. The Yates Memo requires the disclosure of all relevant facts about individual misconduct. “That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.” This language suggests that the Yates Memo does not require the disclosure of (a) the advice of counsel; (b) facts that are not relevant to misconduct by individuals.

XYZ Company should evaluate whether any changes to its investigative and reporting writing policies and procedures should be changed to ensure that it strikes the right balance between protecting the attorney-client privilege and work product doctrines and complying with the expectations set forth in the Yates Memo. After evaluation, XYZ Company may conclude that no changes need to be made at the present time. If and when it is confronted with the issue of how to convey all relevant facts about an individual’s wrongdoing, including statements made during internal interviews, it can decide then whether to make a limited waiver of the privilege or provide the underlying facts in a way that comports with DOJ’s expectations.

*Rationale*: The Yates Memo does not purport to alter the Filip Factors’ treatment of privilege and work product doctrine protections. The Filip Factors make clear that cooperation credit cannot be conditioned on a company’s waiver of privilege and work product protections over its internal investigation. Instead, the Filip Factors contemplates that a company can disclose the underlying facts without having to waive the privilege. For example, in the case of an attorney’s interview notes the Filip Factors contemplate that the company can withhold the notes themselves provided it discloses the “relevant factual information.”[[24]](#footnote-24)

3. *Periodically Revisit the Yates Memo, and Its Implications, Based on Experience*. It remains to be seen how many of the potential implications of the Yates Memo will play out in practice. It is unclear, for example, what it will look like for DOJ attorneys to take a more active role in internal investigations. Moreover, some of the recommendations in this memorandum relate to issues that require a balancing of competing concerns. For instance, while it would reduce certain litigation and ethical risks to formalize *Upjohn* warnings and/or supplement them for individuals suspected of wrongdoing, it could also have a chilling effect on witness interviews. And finally, some of the effects of the Yates Memo may be difficult to foresee. For all of these reasons, we believe it would be prudent to revisit these issues again after the Yates Memo regime has been in effect long enough to assess its practical impact, and on a period basis thereafter.

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1. A copy of the Yates Memo is included as Attachment A. [↑](#footnote-ref-1)
2. The Yates Memo also applies to pending DOJ investigations, but only to the extent practicable. [↑](#footnote-ref-2)
3. In remarks made the day after she issued the Yates Memo, Deputy Attorney General Yates acknowledged that a company may decide that cooperation with DOJ in a particular matter comes at too high a price. *See* Attachment B, *Remarks At New York University Law School Announcing New Policy On Individual Liability In Matters of Corporate Wrongdoing* (September 10, 2015) [hereinafter, “Yates NYU Remarks”] (“Some corporations may decide, for example, that the benefits of consideration for cooperation with DOJ are not worth the costs of coughing up the high-level executives who perpetrated the misconduct”). We state no view as to when and in what circumstances XYZ Company should seek the benefits of cooperation under the terms of Yates Memo. [↑](#footnote-ref-3)
4. It also revises commercial litigation provisions applicable to government attorneys pursuing civil enforcement matters. *See* U.S.A.M. 4-400 et seq. [↑](#footnote-ref-4)
5. *See* U.S.A.M 9-28-700 (“At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation’s legitimate business operations”). [↑](#footnote-ref-5)
6. *See* Yates NYU Remarks (Attachment B) (“Without an inside cooperating witness, preferably one identified early enough to wear a wire, investigators are left to reconstruct what happened based on a painstaking review of corporate documents, looking for a smoking gun that most financial criminals are far too savvy to leave behind.”). [↑](#footnote-ref-6)
7. Attachment C, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the Second Annual Global Investigations Review Conference (September 22, 2015) [hereinafter, “Caldwell Remarks”]. [↑](#footnote-ref-7)
8. *See* Yates NYU Remarks (Attachment B). [↑](#footnote-ref-8)
9. *See* U.S.A.M. 9-28-700 (“Cooperation benefits the government – and ultimately shareholders, employees, and other often blameless victims – by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes.”). [↑](#footnote-ref-9)
10. Yates NYU Remarks (Attachment B). [↑](#footnote-ref-10)
11. Caldwell Remarks (Attachment C). [↑](#footnote-ref-11)
12. *See United States v. Ruehle*, 583 F.3d 600, 604 n.3 (9th Cir. 2009) (outside counsel violated ethical standards when they failed to memorialize that they gave a sufficient *Upjohn* warning prior to initiating an interview as part of an internal investigation). [↑](#footnote-ref-12)
13. Yates Memo, at 4. [↑](#footnote-ref-13)
14. *See* Avoiding The Perils and Pitfalls of Internal Corporate Investigations: Proper Use of Upjohn Warnings, ABA Section of Litigation Corporate Counsel CLE Seminar, February 11-14, 2010, *available at* http://www.kkc.com/wp-content/uploads/2014/08/Avoiding-the-Pitfalls-of-Internal-Corporate-Investigations-Proper-Use-of-Upjohn-Warnings.pdf. [↑](#footnote-ref-14)
15. *See* *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, available at https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf. [↑](#footnote-ref-15)
16. *See id.* (advocating the use of written statements). [↑](#footnote-ref-16)
17. *See id.*; *see also Ruehle*, 583 F.3d at 604 n.3. [↑](#footnote-ref-17)
18. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) (explaining that the *Upjohn* umbrella applies equally to interviews conducted by a non-attorney investigator acting at the direction of counsel as to interviews conducted by the attorney himself or herself). [↑](#footnote-ref-18)
19. *See* Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees, *supra* note 15. [↑](#footnote-ref-19)
20. In circumstances where XYZ Company authorizes the retention of separate counsel at XYZ Company’s expense, the associate may be so advised. [↑](#footnote-ref-20)
21. *See* *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, *supra* note 15. [↑](#footnote-ref-21)
22. *See id.* [↑](#footnote-ref-22)
23. The advisement of rights is not dissimilar to a *Miranda* warning given by police officers before initiating a custodial interrogation. [↑](#footnote-ref-23)
24. The Filip Factors assume without analysis that an interview conducted by a non-attorney would not be subject to the protections of the attorney-client privilege or work product doctrine. As discussed elsewhere, that view is inconsistent with emerging case law. *See supra*, note 18. [↑](#footnote-ref-24)