



JOINT DEFENSE AGREEMENTS IN THE CORPORATE CONTEXT: NO GUARANTEES

The white collar bar knows well by now that corporations, particularly publicly traded corporations and those in regulated industries, are under enormous pressure to cooperate with authorities when under investigation. The “Thompson memo”¹ and similar policies at the Securities and Exchange Commission (SEC),² for example, exert a strong influence toward cooperation.

In the government’s view, of course, “cooperation” usually requires waiving the company’s attorney-client privilege. The Thompson memo is explicit on this point. So, too, has been the SEC in its public statements concerning enforcement decisions.

Thus, prudent corporate counsel, and counsel for individual corporate employees, will be attentive to attorney-client privilege issues from the earliest days of an investigation. The goal for corporate counsel will be to preserve the company’s ability to make strategic decisions to protect its own interests, neither waiving the privilege prematurely nor limiting its ability to waive in the right circumstance.³

For individuals, the cooperation calculus is quite different. While the authorities certainly seek cooperation from individuals, individuals do not have shareholders or directors to whom they answer. Moreover, the personal risk of individual criminal liability may make cooperation an untenable option for a client who has exposure. Accordingly, counsel for individuals are more likely to focus on protecting the attorney-client privilege than on preserving the option of waiving it.

At the same time, both the corporate employer and the employee have several incentives to share information

between them. First, the employee’s counsel needs information from the corporation. Critical documents are likely to be corporate property. Other employees may be reluctant to give interviews directly to counsel for an individual. If the corporation is conducting an internal investigation, individual counsel will be eager to learn the results.

Second, the corporation will want information from the employee. In fact, corporations commonly condition continued employment on cooperation with an internal investigation. Individuals often insist upon doing everything possible to save their jobs, even when counsel cautions them that they are not likely to achieve that end. Even more ominously from their lawyer’s perspective, refusing to cooperate with the corporation’s investigation may also mean losing access to corporate documents and other information critical to preparing a defense.⁴ The employee’s incentive to give the corporation what it

wants may be in serious tension with his need to maintain the privilege as to his own statements.

Joint Defense Doctrine

The solution to which many lawyers turn is the “joint defense” doctrine, sometimes called the “common interest” doctrine.⁵ Briefly, the joint defense doctrine applies to “communications between different persons or separate corporations when the communications are part of an ongoing and joint effort to set up a common defense strategy.”⁶

By hypothesis, the parties to the joint defense agreement have separate attorney-client relationships and their own attorney-client privileges, yet wish for strategic reasons to share information with the other participants. Ordinarily, sharing attorney-client privileged information waives that privilege. But the joint defense privilege is a rule of non-waiver. A communication made under a joint defense arrangement does *not* waive the underlying attorney-

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client privilege.⁷

Thus, joint defense is not so much a separate privilege as a means of preserving the privileges already in place, while permitting communication among parties and counsel about matters of common concern. The doctrine has been recognized for at least a century as “necessary to a fair opportunity to defend.”⁹

Given the joint defense doctrine’s roots in the parties’ own attorney-client privileges, it operates primarily as a guarantee against disclosure by one party of covered communications made by another. Indeed, the cases are legion holding that unilateral waiver of the joint defense privilege is not permissible.⁸ While a party may withdraw from a joint defense agreement, withdrawal is prospective only; even a withdrawing party may never disclose communications made during the course of the joint defense efforts.

This makes intuitive sense. The foundation of joint defense is the preservation of each party’s underlying attorney-client privilege. A third party can no more waive someone else’s attorney-client privilege in this context than in any other. A contrary rule would vitiate the purpose of joint defense.

The advantages to a joint defense arrangement are seemingly obvious. As noted, both the corporation and its employees have an incentive to share information. When employees are separately represented, it is often automatic for their lawyers and the corporate lawyer to agree to a joint defense arrangement. Often the agreements are reduced to writing, although not always.¹⁰

Pitfalls Of Joint Defense

A recent case points up some of the uncertainties.¹¹ In *United States v. LeCroy*, a bank was conducting an internal investigation into a questionable payment authorized by two of its employees. The employees each had his own lawyer, separate from the lawyer for the bank. All of the lawyers agreed orally to a joint defense arrangement.

Subsequently, the bank’s lawyers conducted several interviews of the individuals, with their counsel present. The individuals believed that they faced a Hobson’s choice: they would be immediately terminated if they did not submit to the interviews. The corporate lawyers took notes and prepared memoranda recording the employees’ statements. At the beginning of each interview, corporate counsel reiterated that the joint defense agreement applied. Nonetheless, corporate counsel also stated that the corporation reserved the right to disclose the contents of the

interview to the government “if pushed” by the government to do so. Individual counsel objected that the law of joint defense would not permit such a disclosure. The parties agreed to resolve the issue if and when the bank decided to disclose, and the interviews proceeded.

Months later, at the grand jury stage, the government “pushed.” The bank agreed without a subpoena to turn over counsel’s notes and memoranda from the interviews. Counsel for the individuals objected to the disclosure, citing the joint defense privilege and objecting to the attempt at unilateral waiver. The government “walled off” the documents from the investigative team, and sought the court’s permission to use them at trial after the employees were indicted.

The significance of the case is in the argument that the government made: that joint defense never protects statements made by an employee to counsel for the corporation. Therefore, it contended, a corporation always retains the ability to disclose the statements unilaterally. The theory behind this view is that, because the corporation can speak only through its employees, corporate counsel’s interview of an employee is no more than the corporate lawyer talking to his own client. Under this theory the interview is subject only to the corporation’s own attorney-client privilege, which the corporation may waive in its sole discretion.

The difficulty with that theory in this case was that (1) the employees were separately represented; and (2) corporate counsel had himself invoked the joint defense privilege at the beginning of the critical interview. Thus the government advanced a slightly different formulation, too: joint defense protection applies only to communications made through counsel, not directly by one client to the other client’s lawyer. Under this formulation, corporate counsel could pose questions for individual counsel to ask her client, individual counsel could report back the answers, and joint defense would prevent disclosure.

Also, were counsel for the individual to share with corporate counsel her notes of an interview, those notes would be privileged. Yet if corporate counsel heard the same statements at the same interview, he could disclose the statements without limitation by the joint defense doctrine — again, because the employee’s statements were effectively statements of the corporation, by dint of having been heard directly by corporate counsel.

Unfortunately for the government, this formalistic approach did not explain why corporate counsel had referenced

joint defense at the interview; nor did it comport with a statement in a controlling circuit court decision that defined joint defense as protecting communications “between a client and an attorney for another.”¹²

More importantly, however, the district court rejected the government’s view as inconsistent with the whole concept of joint defense. As the defense argued, holding that a joint defense arrangement never applies to a separately represented employee’s statements to corporate counsel threatens to eliminate joint defense arrangements from the corporate context. The joint defense privilege means nothing if one party can unilaterally waive it as to prior statements. Permitting corporate counsel to unilaterally decide to disclose employee statements made in the joint defense context is tantamount to negating the ability of an employee to enter into a joint defense arrangement with the corporation.¹³ Although the corporation indisputably has the right to disclose employee statements absent the joint defense privilege, it voluntarily limits that option by entering into a joint defense arrangement.

Herein lies the cautionary tale for corporate counsel: you must recognize that by entering into a joint defense agreement you may have limited the corporation’s ability to disclose privileged information if it decides to make that strategic choice. The joint defense arrangement cloaks with an additional layer of protection communications that otherwise would be subject only to the corporation’s own privilege. With a limited ability to disclose information, the corporation may not qualify as “cooperative” in the government’s view.

A Department of Justice (DOJ) representative explicitly so stated in an interview about DOJ policy on privilege waivers, noting that “[i]f the joint defense agreement puts the corporation in a position where it is unable to make full disclosure about the criminal activity, then no credit for cooperation will be factored in.” For this reason, he said, “it is hard for me to understand why a corporation would ever enter into a joint defense agreement.” He left open the possibility that a corporation may be able to make sufficient disclosure of relevant information despite the joint defense limitations on disclosing other information.¹⁴

The defense in *LeCroy* won the war over the critical principle of law, the undergirding of joint defense in the corporate context. Unfortunately it lost the battle on the particular facts. The district court held that by proceeding with the interviews after learning that the bank believed itself free to disclose the employ-

ees' statements, the employees either waived the protections of the joint defense agreement, partially withdrew from it, or accepted a partial modification of it.¹⁵ In flavor, the *LeCroy* opinion says that the employees "assumed the risk" of disclosure when they made their own multifaceted decision to submit to the interview. Interestingly, the judge considered it legally irrelevant that the employees may have submitted only out of fear of termination or other duress; hard choices, he said, are inherent in a grand jury investigation.¹⁶

And herein lies the cautionary tale for individual counsel: you cannot rely on the law of joint defense to preserve your client's privilege when your co-defendants or their counsel have a different understanding of it, and a different incentive to disclose. The danger is particularly acute when your client's corporate employer is a party to the agreement — and even more so when that employer is a public company or otherwise highly regulated. The pressure on the employee to talk to the employer's counsel will be enormous. Yet the individual client must be advised that submitting to the interview carries a risk of disclosure against which joint defense is no guarantee.

The tension between corporate interests and employee interests — together with the government's increasingly aggressive posture demanding corporate privilege waiver — make it unlikely that this is the last time that the government and a cooperating corporation will press this issue. Particularly if the corporation advises that it may turn over the client's statement, the client must understand that making a statement to corporate counsel may be as good as making one to the government.

Public Policy Implications

The judge in *LeCroy* stated that he was motivated to find a waiver of joint defense in part by the public policy interest in the grand jury's access to "any and all information."¹⁷ The opinion did not grapple with the courts' long-standing recognition that the investigative function of the grand jury must yield to proper assertions of privilege. The fact that joint defense is but a particular application of the attorney-client privilege calls to mind the sweeping language of several Supreme Court cases recognizing that the loss of evidence occasioned by the privilege "is justified in part by the fact that without the privilege, the client may not have made such communications in the first place."¹⁸ The privilege advances "broad public interests in the observance of law and administration of justice . . . [it] is one of the pillars that supports the edifice of our adversary system."¹⁹ As an essential

corollary to the attorney-client privilege, joint defense has been recognized for more than a hundred years.²⁰

The privileges can do their salutary work only if the client knows for certain whether a privilege applies when he is evaluating whether to make a statement. Yet under the government's formulation of the joint defense doctrine in *LeCroy*, whether the individual client's communication is privileged depends upon later strategic decisions by his employer. This formulation is inconsistent with the Supreme Court's recognition that analyzing *ex post* whether a privilege should apply to an earlier statement imports too much uncertainty into the application of the privilege, undermining the public policy goal of encouraging full disclosure by clients.²¹

The government's motivation is not difficult to plumb. When asked to respond to the criticism that the government is simply seeking to piggyback on corporate internal investigations, a DOJ representative essentially said "yes, we are."²² The corporation's motivation is equally obvious. It wants to impress the government with the extent of its cooperation. When the employee's statements exonerate the corporation — showing, for example, that the employee was a rogue or the corporation a victim — the corporation has an added incentive to disclose.

The employee is the one whose rights fall by the wayside in this dynamic. The problem is several-fold. DOJ cites limited investigative resources when refusing to apologize for piggybacking on corporate investigations.²³ But the fact of the matter is, the corporate internal investigation has few inconvenient safeguards for individual rights — such as the Fifth Amendment, for example. The corporation may freely use its coercive power over an employee to compel statements that the government could not.

To our knowledge, no one has yet litigated the question whether a corporation that has already agreed to disclose employee statements to the government may be an agent of the government for Fifth Amendment purposes.²⁴ The government no doubt understands the ease with which it can avoid tangling with constitutional and procedural safeguards by making the corporation's work product into its own.

The integrity of the employee's individual attorney-client relationship is also in jeopardy. Corporate counsel who view the separately represented employee solely as a mouthpiece for the corporation are not likely to follow the ethical rule preventing contact with represented parties, for example. The position advocated by the government and corporation in

LeCroy would have rendered the representation by individual counsel a nullity. Moreover, the government attempted to give the corporation the legal ability to decide when the employee's underlying attorney-client privilege would be waived. The employee's privilege became a chip with which the corporation could barter, "trad[ing] resultant disclosures . . . as the price of [its] own exoneration."²⁵

This latter point illustrates one policy downside of the government's position for the government itself: by encouraging corporations to give up employees as the price of corporate exoneration, the government is grabbing only the low-hanging fruit. The ultimate enforcement goal should be broader: to encourage compliance at the corporate level.

The government also risks limiting its own access to information over the long term by limiting the utility of joint defense agreements for employees. Naturally, employees who fear that their statements may be delivered to the government will be less likely to offer them to the corporation's lawyers. That chilling effect will not only hamper internal investigations, but will hamper corporate compliance efforts, too.²⁶

Advice For Counsel

Careful attention to the contours of the joint defense arrangement at the outset will go some of the way toward reducing the uncertainties inherent in the decision to enter into one. The downside to this early attention is importing into initial discussions between corporate and individual counsel a potentially contentious issue. At a time when all counsel may be making reassuring noises along the lines of "we're all working together to find out what happened," flagging the possibility of a divergence in interest may change the dynamic.

One area to which counsel can attend, perhaps without the need for adversarial discussions, is the definition of "covered materials" usually included in a written joint defense agreement. Often these provisions are written with the exchange of documents, not oral statements, in mind. A document-centered definition will benefit corporate counsel who later wishes to disclose the content of interviews. Or corporate counsel may advocate a definition that applies only to communications made through counsel. Individual counsel, in contrast, will wish to propose a definition that encompasses statements by a client to any member of the joint defense arrangement (counsel or client), as well as documents exchanged.

Another possibility is to leave for later resolution the question of whether an interview by corporate counsel will be

protected by joint defense. When the corporation requests an interview, counsel could then negotiate an addendum to the joint defense agreement that addresses the interview explicitly. This option is not always available because often the interview request arises at the very beginning of counsel's involvement, particularly if the individual client is at the center of the corporation's — and the government's — inquiry. But at least some cases will present an opportunity to see how the defense strategies of each party are developing before committing to a position about whether the corporation may disclose the contents of the interview.

Of course, individual counsel and their clients may justifiably wonder how much leverage they will have in negotiating the ground rules of a corporate interview. Naturally the answer is: it varies. Some factors will include the individual's employment status (a corporation has more leverage over an employee who is trying to save his job than it does over one who has already been fired), and the degree to which he is in sole possession of information that the corporation needs.

If the corporation is already leaning toward cooperating — and in this day and age, many never seriously consider the alternative — then it is more likely to insist on the ability to disclose. Often a cooperating corporation is eager to isolate a "rogue" employee whom it can terminate to impress the government, and an employee who refuses to give an interview without an assurance of privilege may play into the corporation's strategy of painting him in that role. Certainly a corporation that believes itself the victim of the employee's wrongdoing is less likely to negotiate for the employee's protection.

In contrast, a corporation that will stand by its employee's actions and fight the case is more likely to agree that it will not disclose the contents of the interview. The employee's own defense strategy will influence his attitude toward the joint defense problem too. Is he himself trying to paint a cooperative picture for the government? Is he a mere witness who does not wish to call attention to himself? If so, he is more likely to give an interview without an assurance of privilege. Or is the employee a putative target who is asserting her constitutional rights and putting the government to its proof? In that case, she probably will not give an interview under any circumstances that may convert it into a statement for the government's use.

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The Implications of the Raich Decision on the Medical Use of Marijuana David Michael, Esq.
Defending A Medical Marijuana Case Lee Berger, Esq.
Defending Against DUID and DUI Cases Paul Aronson; Richard Hirsch, Esq.
Cross Examination of a Police Expert in Cultivation Cases William Patten, Esq.; Chris Conrad

Friday

Dog Searches: Can They Really Detect Marijuana? Does the 4th Amendment Apply? Jeffrey Steinhorn, Esq.; James Woodford, PhD.
Automobile Stops and Racial Profiling William H. Buckman, Esq.
Ethics Marvin Miller, Esq.; Alan Silber, Esq.
Cross Examination Kent Schaffer, Esq.
Federal Sentencing Guidelines (post Booker) Carmen Hernandez, Esq.

Saturday

Mejar Un Pendejo Que Dios Don't Let Your Opponent Establish Your Own Level of Professionalism Charlie Daniels, Esq.
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retain incentives to enter into a joint defense arrangement. The government's stance on corporate cooperation often puts the two in undeniable tension, however. Careful attention to the parties' conflicting interests, and to the implications of those interests for the privilege, is the key to negotiating a joint defense arrangement that permits ethical fact finding and a fair defense for all parties involved.

Notes

1. *Federal Prosecutions of Business Organizations*, Memorandum from Deputy Attorney General Larry D. Thompson to the United States Attorneys' Offices (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

2. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SECURITIES EXCHANGE ACT RELEASE NO. 44969 (October 23, 2001), available at www.sec.gov/litigation/investreport/34-44969.htm.

3. See Stephanie A. Martz, *Keeping the Board of Directors Cool While The Company's In the Hot Seat*, THE CHAMPION, August 2005.

4. Counsel who are advocating pre-indictment rely upon cooperation for access to information. Post-indictment, a cooperative joint defense arrangement with corporate counsel will be the only way to ensure access to privileged corporate information that may also be helpful to the defense.

5. THE RESTATEMENT OF THE LAW GOVERNING LAWYERS uses the term "common interest privilege" to describe what this article refers to as a "joint defense" situation: clients who share a "common interest" but have separate lawyers. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ("Restatement") Section 76. This article does not address the difficulties presented when two clients share one lawyer. See Restatement Section 75 ("co-clients" with "common interest" represented by same lawyer). In the corporate context that situation is fraught with peril, because it is difficult for a corporate employee to establish that he had a personal attorney-client relationship with the corporation's lawyer. See, e.g., In re Grand Jury Subpoena: Under Seal, ___ F.3d ___, 2005 WL 1663786 (4th Cir. July 18, 2005); In the Matter of Bevill, Bresler & Shulman Asset Management, 805 F.2d 120, 126 (3d Cir. 1986). Absent that personal attorney-client relationship, there is only one client and thus no possibility of a "joint defense."

6. *Haines v. Liggett Group Inc.*, 975 F.2d 81, 94 (3d Cir. 1992).

7. In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Section 76 comment b.

8. *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979).

9. See, e.g., *United States v. Almeida*, 341 F.3d 1318, 1323-1324 (11th Cir. 2003) (dicta); *United States v. Weissman*, 195 F.3d 96 (2d Cir. 1999); *Morrell v. Local 304A*, 913 F.2d 544, 555 (8th Cir. 1990); In re Sealed Case, 29 F.3d 715, 719 (D.C. Cir. 1994); In re Grand Jury Subpoenas, 902 F.2d 244, 248 (4th Cir. 1990); *McPartlin*, 595 F.2d at 1337; *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965); and very many district court cases.

10. Theoretically, the joint defense relationship may arise as a matter of law when two parties share privileged information in furtherance of a common interest. The better practice is to make explicit the joint defense understanding, however, whether orally or in writing.

11. *United States v. LeCroy*, 348 F.Supp.2d 375 (E.D. Pa. 2004), amended on reconsideration Jan. 10, 2005.

12. *Bevill, Bresler*, 805 F.2d at 126.

13. *LeCroy*, 348 F.Supp.2d at 385 n.8.

14. Interview with U.S. Attorney James B. Coomey Regarding the Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection ("Coomey interview"), UNITED STATES ATTORNEYS' BULLETIN, November 2003, available at www.usdoj.gov/usap/eousa/foia_reading_room/usab5106.pdf.

15. The government had disclaimed reliance on any of these theories, taking instead the "all or nothing" approach that joint defense does not apply at all to an employee's communications with corporate counsel. The court nonetheless adopted this analysis, noting that it was unnecessary to specify which of the three theories governed, because the practical result was the same. *LeCroy*, 348 F.Supp.2d at 384.

16. *LeCroy*, 348 F.Supp.2d at 386.

17. *Id.* at 387.

18. *Swidler & Berlin v. United States*, 524 U.S. at 408.

19. In re Ford Motor Co., 110 F.3d 954, 961 (3d Cir. 1997).

20. *McPartlin*, 595 F.2d 1321, 1336.

21. See *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1968).

22. *Coomey interview, supra* n. xiv.

23. *Id.*

24. Consider in this context the Computer Associates, Inc. indictments for obstruction of justice, to which several employees pled guilty. The obstruction charges arose out of the employees' lying to corporate internal investigators after learning that the corporation would disclose the results of the investigation to the government. *United States v. Rivard*, No. 04-329 (E.D.N.Y.); *United States v. Kaplan*, No. 04-330 (E.D.N.Y.); *United States v. Zar*, No. 04-331

(E.D.N.Y.).

25. In re Grand Jury, 406 F.Supp.381, 394 (S.D.N.Y. 1975).

26. See, e.g., Consensus Statement of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 321 (2003). ■

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