ANDREWS LITIGATION REPORTER

THOMSON WEST

White-Collar Crime

COMMENTARY

REPRINTED FROM VOLUME 22, ISSUE 12 / SEPTEMBER 2008

Joint Defense Agreements: What Is a Responsible Company to Do?

By Ed Magarian, Esq., and Surya Saxena, Esq.

Faced with an allegation by the government that one or more of its employees has engaged in criminal wrongdoing, a company's primary responsibility is to uncover facts sufficient to guide its response. Finding facts sounds easy enough on its face, until one considers the catch-22 created when companies, seeking to encourage a free and candid discussion about the alleged criminal wrongdoing, enter into a joint defense agreement with one or more of their employees. Through a JDA the company and an employee agree that if they share confidential or privileged information with one another (joint defense materials) they will keep those communications confidential and will not disclose them to a third party, including the government.

What is this catch-22? Often the best way for a company to learn and understand facts is by talking to its employees. Full and candid employee interviews help the company gather sufficient evidence to respond appropriately to allegations of wrongdoing. Sometimes it is not possible to secure a full and candid interview unless the employee has some confidence that his communication will be protected in some manner, such as by a JDA. However, if a company enters into a JDA in order to entice key employees to disclose material facts, the company may end up learning facts it cannot disclose and in so doing undercut or limit its available options.

This conflict is especially problematic where a company would prefer to disclose the illegal or wrongful conduct to the government to minimize its exposure and obtain credit for cooperation. This conflict is even more troubling for companies in highly regulated industries, especially where the company has a legal obligation to disclose the wrongdoing. In such circumstances, a traditional JDA actually can interfere with a company's legal obligations.

What is a responsible company to do? Does the company endeavor to discover the facts, even if doing so may limit its ability to disclose everything it learns? Does the company refuse to enter into a JDA to preserve its ability to fully disclose the facts it has, even if doing so means it might not uncover or fully understand the material facts? What should a company in a highly regulated industry do if it is legally obligated to investigate alleged wrongdoing, but it cannot uncover sufficient material facts without entering into a JDA?

These difficult questions have forced companies to develop creative solutions to address the JDA dilemma. One increasingly prevalent trend is for companies to insert language directly into a JDA expressly allowing the company to make a unilateral disclosure of joint defense materials. But this practice has several serious risks, which may create some uncertainty. Indeed, depending on the specific case, the consequences of this practice may prove worse than a decision to forgo a JDA entirely.

In order to fully understand the risks of this new trend, this article begins with a discussion of the legal underpinnings of joint defense agreements and the joint defense privilege. It then outlines several recent legal developments in the application of the joint defense privilege, which have motivated companies to seek the right to unilaterally disclose joint defense materials. Finally, it addresses the several pitfalls associated with the new unilateral disclosure trend and offers several considerations for the practitioner contemplating such an arrangement.

Legal Foundations of the Joint Defense Privilege

When allegations of wrongdoing surface, both companies and employees often are advised to enter JDAs. By establishing a joint defense privilege between the two

sides, the JDA, as the conventional wisdom goes, serves both the company and the employees by allowing the free flow of information without fear of disclosure to third parties.

Courts in both criminal and civil cases long have held that the "need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter."[1] The joint defense privilege advances this goal by "serv[ing] to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."[2] While there are recent and pertinent outliers (as discussed below), the overwhelming majority of courts have established that the joint defense privilege or "common-interest doctrine" applies whenever two or more parties agree (expressly or impliedly) that they have a common legal purpose or strategy and expect that the privileged information they share in furtherance of that common enterprise will be kept confidential by the commonly interested party who receives it.[3]

The joint defense privilege, at minimum, acts as a rule of non-waiver; parties may disclose their otherwise attorney-client- or work-product-privileged communications and materials to their joint defense allies without waiving those underlying privileges. Indeed, several courts have suggested that this is the complete extent of the joint defense privilege; *i.e.*, that it *only* protects information that is independently privileged.[4] But the majority of courts hold that the doctrine protects communications made by one party to the attorney of another party, even if such communications are made outside the presence of the first party's counsel, as long as a common-interest relationship has been established.[5] That is, as long as the parties believe the shared information will be kept confidential and as long as their sharing of information furthers the common enterprise or common legal purpose of the parties, the information is privileged.

It should also be noted that, while joint defense privilege is commonly invoked after the parties sign a JDA, the contract and the privilege are not necessarily co-extensive, nor are they co-dependent. The joint defense privilege, like the attorney-client privilege and the work product doctrine, applies whether or not the parties have specifically entered an agreement not to disclose joint defense materials.[6] It is the particular facts and circumstances of a relationship that give rise to an obligation to protect joint defense materials, just as the circumstances dictate when the attorney-client privilege attaches.

Once the parties have agreed that they have a common legal purpose (in writing, orally or by conduct), the privilege prevents one party from disclosing joint defense materials without the other's consent. Since all commonly interested parties hold the privilege, any party can thwart another's self-interested attempts to disclose joint defense materials.[7] As one court noted, "[t]hat a joint defense may be made by somewhat unsteady bedfellows does not in itself negate the existence or viability of the joint defense."[8]

Of course, the heart of the traditional JDA mirrors the common-law joint defense privilege by prohibiting the parties from unilaterally disclosing joint defense materials. Indeed, though parties may withdraw from the agreement, they do so only prospectively.[9] They may never disclose joint defense materials shared when the agreement was in effect. Thus, under normal circumstances, the obligations imposed by the legal doctrine of joint defense, and the self-imposed restrictions embodied in joint defense agreements, are congruent.

The Government's Hostility to JDAs and Their Evolving Applicability

The Department of Justice's Thompson and McNulty Memos, the Securities and Exchange Commission's Seaboard report, and statutory schemes like Sarbanes-Oxley have fundamentally altered the "normal circumstances" surrounding a JDA, however. While corporations and employees still are often best served by sharing joint defense information, the corporation now has the added, and sometimes primary, interest of demonstrating that it is cooperating with a government investigation. Sometimes it is in the corporation's best interest to identify a particular employee who is independently at fault for alleged misconduct and to provide information that the government can use in its criminal prosecution.

Despite the government's desire to reap the benefits of a corporation's internal investigation and the corporation's incentive to cooperate, employees usually can thwart a corporation's unilateral disclosure of employee statements if obtained pursuant to a joint defense agreement. For example, one court already has required the SEC to return, and avoid relying on, joint defense materials unilaterally disclosed by one joint defense partner without the other's consent.[10]

This broad power for employees to thwart unilateral disclosure of their information led former Deputy Attorney General James B. Comey to state that "[i]t is hard for me to understand why a corporation would ever enter into a joint defense agreement because doing so may prevent it from making disclosures it either must make if it is a

regulated industry or may wish to make to a prosecutor."[11] He further stated 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."[12]

What Can a Responsible Company Do?: The Pitfalls of Agreements Allowing Unilateral Disclosure

Deputy Attorney General Comey's statement ignores the fact that a company may not be able to learn the facts sufficient to make a reasonable disclosure without a JDA. Hence, the catch-22. What is a responsible company to do? Faced with these conflicting messages, at least one court has attempted to provide companies with a middle-path — or perhaps a tightrope to walk — that would allow them to reap the benefits of a JDA but still make comprehensive disclosures to prosecutors.

In *United States v. Lecroy*, 348 F. Supp. 2d 375 (E.D. Pa. 2004), the U.S. District Court for the Eastern District of Pennsylvania ruled that interview notes and memoranda prepared by JPMorgan Chase's counsel during internal investigation interviews with employees were not subject to a joint defense privilege.[13] The court made that ruling despite finding that the employees had entered a JDA before submitting to the interviews in question.[14] Specifically, the *Lecroy* court found that the employees waived the joint defense privilege because, prior to submitting to the interview, JPMorgan's counsel informed the employees and their counsel that the company "would waive the privilege if the government pushed."[15]

The *Lecroy* court apparently gave no weight to the fact that the employees' counsel reacted to this statement by expressing that JPMorgan could not make such a unilateral waiver under applicable law and that the employees expected the interview communications to be subject to the JDA.[16] The parties agreed to resolve their dispute about the applicability of the privilege if the government ever requested the materials.[17] However, when the government requested the documents, without a subpoena, JPMorgan unilaterally turned them over without consulting the employees.[18]

On these facts, the court ruled that the employees, although a party to a JDA, effectively assumed the risk of potential disclosure of their statements because they submitted to the interviews after learning about JPMorgan's belief that it could unilaterally disclose the information.[19] The court ruled that the employees either waived the joint defense privilege by submitting to the interviews after learning of the company's intent to potentially disclose or impliedly agreed to modify their joint defense agreement to allow for unilateral disclosure.[20] In either case, JPMorgan was allowed to make a unilateral disclosure of the notes and memoranda.[21]

Lecroy appears to offer a middle ground to companies, allowing them to enter into a JDA but decide on an *ad hoc* basis what information will be protected and what will not. Such an arrangement is hardly a model for building trust and encouraging the free flow of information. Its advantage is that it may allow for selective disclosure of what would otherwise have been joint defense material. However, the *Lecroy* solution may not be followed in other jurisdictions, and a "selective" disclosure of information gathered from employees could even be seen by some courts to constitute a broader waiver of privilege and/or joint defense materials.

In light of *Lecroy*, and in view of prosecutorial persistence that companies waive privileges, corporations have increasingly begun to follow another potential solution by planning for the possibility of unilateral disclosure in the text of the JDA itself. Counsel for corporations have begun inserting unambiguous language into JDAs that specifically entitles the corporation to disclose joint defense materials without unanimity with its joint defense partners. This strategy is obviously attractive to corporations, which expect to receive the benefit of learning employees' confidential information, while reserving the right to get credit with the government by disclosing the materials.

This new trend, which avoids the "gotcha" solution of *Lecroy*, still has several pitfalls, some obvious and some not so apparent.

Pitfall 1: Discouraging the Sharing Of Information

Plainly, corporate counsel's insistence on a unilateral disclosure provision in the JDA may stop the JDA negotiations before they start. Or, more likely, the employee may still enter into the JDA but refuse to fully disclose information to his or her employer. Without a clear and comprehensive agreement that joint defense communications will be protected, the employee has no reason to believe any communications will be privileged. Accordingly, the original purpose of the JDA — to encourage a free exchange of accurate information — is lost, and the employee has no incentive to be forthcoming.

On the other hand, a joint defense agreement does offer an employee an important benefit — the prospect of receiving company information which the employee and his or her counsel may need to mount a successful defense. The need for such information, and the fear that

the employee may lose his or her job if the employee does not cooperate, will likely be a powerful incentive for an employee to enter into a JDA even if it has a unilateral disclosure provision. A company's requirement that the employee cooperate in its investigation may also provide sufficient incentive for the employee to be forthright about the material facts even in the absence of a JDA. In sum, while the risk of nondisclosure always will be present if a unilateral waiver provision is included in the JDA, the risk may well be manageable and acceptable depending on the nature of the allegations.

Pitfall 2: Destroying the Confidentiality Of Company Information

More troubling is the risk that a unilateral disclosure provision might destroy the company's own ability to prevent employees from unilaterally disclosing the company's privileged information in some jurisdictions. Since *Diversified Industries Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978), the 8th U.S. Circuit Court of Appeals has allowed companies to "selectively" disclose attorney-client-privileged materials to authorities without finding a broad waiver of the attorney-client privilege.[22] Indeed, the *Diversified Industries* court specifically explained that "to hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them."[23] Relying on *Diversified Industries*, a company might expect that it could disclose joint defense materials to obtain credit for cooperating with authorities, while otherwise preventing the disclosure of the company's confidential joint defense information to any other source.

But no other circuit has followed *Diversified Industries*. Further, the 8th Circuit's selective disclosure rule has not been extended to joint defense materials. Thus, thoughtful counsel for employees have ample legal authority to draw upon to contend that the unilateral disclosure provisions in JDAs destroy the joint defense privilege for *all* information exchanged by the parties.

For example, in *In re Qwest Communications International Inc.*, 450 F.3d 1179 (10th Cir. 2006), the court ruled that plaintiffs in a securities class action could obtain and rely on Qwest's privileged documents shared within the joint defense group because Qwest previously had waived the joint defense privilege by providing joint defense materials to the SEC in cooperation with its investigation.[24] Employees, or class-action plaintiffs, easily could claim that once a corporation shares any joint defense materials with authorities, there has been a broad-based waiver of the joint defense privilege with respect to the corporation's own joint defense materials.

Pitfall 3: Violating Employee Rights

Additionally, employees' counsel could use the existence of a unilateral disclosure provision in a JDA as evidence that the company is acting as an instrumentality of the government, and advance violations of constitutional rights per *United States v. Stein,* 435 F. Supp. 2d 330 (S.D.N.Y. 2006).[25] In *Stein* U.S. District Judge Lewis A. Kaplan of the Southern District of New York ruled that two of the Thompson Memo's criteria for assessing corporate cooperation were unconstitutional, effectively because they made accounting firm KPMG an agent of the government empowered to coerce information from employees in violation of their Fifth and Sixth Amendment rights.[26]

Although no court has so held, it is certainly possible that employees could contend that the company obtained statements from them under the false pretenses of a joint defense arrangement, arguing that the company expected to provide such statements to authorities all along. Such provisions, it could be argued, allow companies to entice employees to unwittingly waive their Fifth Amendment right to remain silent and potentially their Sixth Amendment right to counsel, assuming that employee statements are obtained outside the presence of the employees' own counsel. Although such an argument likely will not be successful, if it were, employees could preclude the government from using the coerced statements and prevent the corporation from getting credit for cooperating.

Pitfall 4: Preventing the Privilege From Attaching at All

Employees also could argue that the corporation's expressed expectation of disclosing information to the government, against the employees' interests, is evidence that the parties never had a common legal purpose in the first place, and therefore neither side can claim the privilege. The employees then could freely use confidential or privileged corporate information obtained through the joint defense relationship against the company.

Pitfall 5: Enabling the Use of Company Information Against the Company

Further, employees may draw on the resurfacing but centuries-old legal principle that if one joint defense partner "turns state's evidence," the other joint defense partner should be entitled to use joint defense materials to indict that witness's credibility.[27] Although this doctrine of waiver traditionally has come into play in cases with individual co-defendants, it would not be surprising for an employee who has been indicted based on information

disclosed by the corporation to use corporate joint defense materials against the corporation in his own defense. Such a turn of events could easily erase the legal and public relations benefits the corporation sought to gain by cooperating in the investigation in the first place.

Pitfall 6: Rendering the JDA Unenforceable

Employees' counsel also could use the oft-forgotten principle of illusory contracts to argue that the corporation really has not agreed to do or forebear anything if it reserves the right to unilaterally disclose at its own option.[28] This seemingly dormant principle of contracts recently has been used to preclude a corporation from using contract language to allow it to unilaterally alter the applicability of an arbitration clause and could be reasonably expanded to cancel JDAs.[29] If successful, this would be another means for the employee to argue either that there is no joint defense relationship (and then disclose corporate joint defense materials) or conversely that the common-law privilege applies rather than the illusory contract (and thereby preclude the corporation from disclosing the employee's information to authorities).

Considerations for Practitioners

In the face of these contingencies, should counsel for both sides choose not to enter a JDA at all? Should counsel go even further and attempt to make clear that the parties do not acknowledge a common legal purpose, so that the joint defense privilege will never attach? Although there is not necessarily one right answer for every case, it has become increasingly clear that it is often in a company's best interest (especially a public company) to gather as much information as possible before making a decision about whether to enter into a JDA. In most cases, companies should not immediately jump into a JDA. Sometimes the company actually may develop facts sufficient to make an informed decision about how to respond to the allegations without ever having to enter a JDA. Doing so usually will be in the company's best interest because it will leave the company's options open. If a company ultimately decides to enter into a JDA, it should ensure that the ground rules are clear up front and seriously weigh the benefits and risks of including a unilateral waiver provision in the agreement.

Unfortunately, practitioners will find that there is no one solution that will apply to every case. As a result, they will often be forced to make uneasy, case-by-case assessments of whether a JDA is in their client's interest and be prepared to contend with the often unpredictable consequences of such a decision.

Notes

[1] *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989).

[2] *Id.* at 243.

[3] *See, e.g., id.; Evergreen Trading v. United States,* 80 Fed. Cl. 122, 143-44 (2007); *In re Grand Jury Subpoenas 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990); *Children First Found. v. Martinez,* No. 1:04-CV-0927 (NPM/RFT), 2007 WL 4344915 at *14 (N.D.N.Y. Dec. 10, 2007).

[4] *See, e.g., Allied Irish Banks v. Bank of Am.*, No. 03 Civ. 3748(DAB)(GWG), 2008 WL 783544 at *7-*8 (S.D.N.Y. Mar. 26, 2008).

[5] *See, e.g., Schwimmer,* 892 F.2d at 243-44.

[6] *Id.*

[7] *See, e.g., Lugosch v. Congel*, 219 F.R.D. 220, 293 (N.D.N.Y. 2003).

[8] *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974,* 406 F. Supp. 381, 392 (S.D.N.Y. 1975) (quoted in *Children First Found.*, 2007 WL 4344915 at *14).

[9] *See Lugosch*, 219 F.R.D. at 293.

[10] *SEC v. Nicita*, No. 07CV0772 WQH (AJB), 2008 WL 170010 at *2-*4 (S.D. Cal. Jan. 16, 2008).

[11] Interview with U.S. Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, Corporate Fraud Issues, U.S. Department of Justice Executive Office for United States Attorneys, Office of Legal Education (November 2003), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf.

[12] *Id.*

[13] 348 F. Supp. 2d 375 (E.D. Pa. 2004).

[14] *Id.* at 378-79.

[15] *Id.* at 380.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 376-77.

[19] *Id.* at 384-85.

[20] *Id.*

[21] *Id.*

[22] 572 F.2d 596 (8th Cir. 1978)

[23] *Id.* at 611.

[24] 450 F.3d 1179 (10th Cir. 2006).

[25] 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

[26] *Id.; see also* David Eldred, *The Defense Strikes Back: United States v. Stein — A Significant First Step in Recouping the Rights and Privileges of Targeted Employees,* CORPORATION (Feb. 15, 2007).

[27] *See United States v. Almeida*, 341 F.3d 1318, 1325 (11th Cir. 2003).

[28] *See* American Jurisprudence, Contracts § 130.

[29] *See Hill v. Peoplesoft USA*, 333 F. Supp. 2d 398, 403-6 (D. Md. 2004).

Ed Magarian *is a partner in* ***Dorsey & Whitney's*** *trial practice group in Minneapolis. He is co-chair of Dorsey's white-collar-crime and civil fraud practice group. His areas of practice include complex commercial litigation, white-collar criminal defense, class-action defense, antitrust, assisting clients in government investigations and civil fraud.* ***Surya Saxena*** *is a trial lawyer in the firm's Minneapolis office. He practices in the areas of intellectual property, white-collar crime and civil fraud, computer and data security, and business.*