

Holland & Knight

ETHICAL ISSUES FOR WHITE COLLAR DEFENSE AND INVESTIGATIONS LAWYERS

Part 1 of 3: Joint Defense Agreements

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¹ Holland and Knight's Legal Profession Team represents lawyers and law firms in the broad array of issues unique to the legal profession. The Legal Profession Team provides advice on, *inter alia*, compliance with ethical rules, disciplinary defense, retail legal malpractice, partnership formation, partnership dissolution, partnership disputes, lateral lawyer moves (i.e., switching firms), attorney fee disputes, disqualification motions, and complex attorney-client privilege or work product questions. The authors would like to extend a special thank you to Peter Jarvis and Allison Rhodes (co-chairs of Holland & Knight's Legal Profession Team), for their contributions to the first installment of this paper.

Series Overview

Recent corporate scandals have made effective and honest corporate governance the chief priority for every company. Proactive and incisive white collar defense counsel in this area is a must. Reacting swiftly to serious problems can be an important factor affecting the final outcome. But white collar defense and investigation lawyers must be mindful of unique ethical issues that can arise in representing clients in criminal and civil government investigations.

This series of articles discusses three general sources of ethical issues for white collar defense lawyers that we see most frequently: (1) entering into Joint Defense Agreements with other defendants or other subjects in government investigations; (2) privilege considerations when conducting corporate internal investigations; and (3) representing clients who may be engaged in unlawful conduct during the course of representation.

This series may be used as a general reference, but it focuses on ethical rules (and related evidentiary and procedural rules) applicable in California, including both the California Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. The California Supreme Court has noted:

[R]ule 1-100(A) of the Rules of Professional Conduct, applicable to California attorneys, provides that “[e]thics opinions and rules and standards promulgated by ... bar associations may also be considered” when judging the actions or omissions of an attorney. “Thus, the ABA Model Rules of Professional Conduct may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California.” (State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 656, 82 Cal. Rptr. 2d 799.) “[C]ourts and attorneys find the [ABA Model Rules] helpful and persuasive in situations where the California rules are unclear or inadequate.” (Witkin, 1 Cal. Procedure (5th ed. 2008) Attorneys, § 407(3), p. 521.)²

The ABA Model Rules, which have been largely adopted in every jurisdiction other than California, can differ substantially from the California Rules; it is therefore sometimes difficult to assess how much weight to give to the Model Rules in California. The salience of the Model Rules should be assessed on a cases-by-case basis. Although other states may have similar rules and guidelines on the issues discussed herein, lawyers should always check their home-state rules, as well as the rules applicable in their federal district and circuit courts, which sometimes differ from state standards.

² *In re Reno*, 55 Cal. 4th 428, 466-67 (2012); California lawyers are also extensively regulated under Cal. Bus. & Prof. Code, Chapter 4.

Finally, we caution that the article is intended to provide a survey of potential issues and pertinent authorities, but is not intended to be comprehensive.

Part 1 of 3: Joint Defense Agreements

A common source of ethical issues for white collar criminal defense lawyers is the Joint Defense Agreement (JDA). Understanding when and how to use a JDA is critical for avoiding ethical pitfalls.

Communications on legal issues between the subject/target of a government investigation and his attorney are privileged. But many other kinds of communications common in cases with multiple subjects or defendants are not necessarily privileged. For instance, the basic attorney-client privilege may not cover communications between two subjects/defendants, between the lawyers for co-defendants, and even between a defendant and her co-defendant's lawyer. Such communications are not between a client and her lawyer, and therefore do not meet the fundamental elements of the attorney-client privilege. This problem can be tempered, but not wholly cured, by a JDA.

Courts commonly have taken two approaches to determining how JDAs affect privilege. Some courts recognize a privilege separate from the attorney-client privilege, the so-called joint defense or common interest privilege. Other courts hold that JDAs do not extend the privilege at all, but merely protect already privileged information from being waived when it is shared outside the attorney-client relationship pursuant to a JDA.³

The difference between those two paradigms could, at least theoretically, matter. A communication between a defendant and counsel for a co-defendant, for example, might be protected by the joint-defense privilege, but may not be privileged under the latter paradigm because such communications do not qualify for the attorney-client privilege in the first place.

And even in jurisdictions recognizing a joint defense privilege, it is a mistake to think communicating openly on the defense side is risk-free. It is unlikely, for example, that communications between co-defendants without any counsel present will be protected or privileged.⁴

³ Compare *United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005) (recognizing joint defense privilege as extension of attorney client privilege that "protects not only the confidentiality of communications passing from a party to his or her attorney but also 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") (internal quotation omitted) with *OXY Resources Calif. LLC v. Sup. Ct.*, 115 Cal. App. 4th 874, 889-90 (2004) (refusing to recognize the "joint defense privilege" under California law; finding no privilege under the Joint Defense Agreement).

⁴ See *Austin*, 416 F.3d at 1022 (suggesting no privilege exists for communications outside presence of counsel).

It is true that work product protection may help shield some communications that occur outside the attorney-client relationship, but such protection is more likely to attach to communications between attorneys (or at least involving an attorney), and it can be more difficult to forecast what will and will not ultimately be protected under that doctrine. Reliance on work product alone, especially for highly sensitive information, is not advisable in light of the lack of clarity in this area of the law.

Given the uncertain level of protection under either paradigm, it is clear that parties to a JDA should carefully set out who within the group may or may not communicate with whom. The safest route will be to make sure that JDA communications are run through the attorneys or at least take place in the presence and at the direction of the attorneys. Beyond this basic principle, there are still a number of considerations that parties to a JDA must keep in mind.

1. The Substantive and Temporal Scope of the JDA

Just as every client engagement letter should have a clearly defined scope of representation, every JDA should clearly outline areas of common legal interest and the joint strategy for each area.⁵ If information falling outside the area of common interest is shared, there is a greater risk of waiver even with a JDA in place.

Similarly, because communications occurring before the existence of or after the termination of the JDA will generally not be protected, defining the temporal scope is important. Setting the beginning date should be relatively straightforward. Parties often back-date JDAs, but it is still wise to enter the JDA sooner rather than later so there is no ambiguity about its scope during the initial round of information sharing.

Defining the end date of a JDA is more difficult. If, for example, new facts gradually come to light that drive a wedge between the defendants' interests, the JDA could implicitly come to an end. One or both defendants may, for example, discover facts revealing that one of the defendants is much more culpable than the other. In such circumstances, the defense teams may distance themselves while still sharing some information—never knowing exactly when/if their common interest (and therefore their ability to share privileged information) has come to an end. The JDA can add at least some clarity to such situations. The parties could, for example, agree to notify one another when either side has reason to believe the common interest has come to an end.

⁵ *Cf. In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (to maintain protection, communications must be pursuant to a joint strategy rather than merely a shared interest in the outcome of the legal matter).

Finally, as discussed in more detail below, the parties must contemplate what will happen when/if one of them decides to cooperate with the government.

2. Define Your Duties

When entering into a JDA, an attorney must consider the additional duties she takes on under that agreement. The primary area of concern involves duties between the attorney and the co-defendant. At the far end of the risk spectrum is the possibility that the attorney will form an attorney-client relationship with the co-defendant.⁶ This result could be very problematic on many levels. A host of duties that flow from attorney to client would obviously attach. To begin with, the attorney would have immediate conflict issues because lawyers are generally not allowed to represent co-defendants in criminal matters.⁷ Beyond that immediate issue, the formation of an attorney-client relationship carries with it the potential for civil and disciplinary liability for any breaches of duty to the client.

The JDA can and should expressly disclaim duties flowing from the attorney to the co-defendant, but such a disclaimer could still be vitiated by subsequent conduct, such as giving individualized advice to a co-defendant.

3. Circumstances Under Which Each Party May Waive Privilege

Some authorities have concluded that while any party to a JDA may *assert* privilege as to any JDA communication, a party can only waive privilege as to his or her own communications.⁸ This is an equitable default rule, and it would be wise to reiterate

⁶ See *U.S. v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (holding that “[a] joint defense agreement establishes an implied attorney-client relationship with the co-defendant”).

⁷ See, e.g., Comment [23] to ABA Model Rule 1.7 (“The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.”); see also *Gendron v. State Bar*, 35 Cal.3d 409 (1983); California State Bar Formal Op. No. 1970-22.

⁸ See *United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012):

[T]he case law is clear that one party to a JDA cannot unilaterally waive the privilege for other holders. See *United States v. BDO Seidman, LLP*, 492 F.3d 806, 817 (7th Cir. 2007) (The “privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties.”); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990) (joint defense privilege cannot be waived without the consent of all parties to the defense); *In re Grand Jury Subpoenas*, 902 F.2d at 250 (holding that all documents related to common claim “are subject to a joint defense privilege that[one party] may not waive unilaterally”). The Restatement similarly indicates that one party to a common-interest arrangement lacks the ability to waive the privilege as to other members:

Any member of a common-interest arrangement may invoke the privilege against third persons, even if the communication in

it in the JDA itself. If the JDA is silent on this issue, or if this issue is not even discussed, a careless or rogue co-defendant may share your client's information, and may even argue that such waiver was impliedly allowed under the JDA.

4. How the Parties Will Deal With Future Adversity, Including a Party's Cooperation with the Government

It is important to not only understand where parties' interests are aligned for purposes of drafting a JDA, it is, of course, also important to identify potential points of adversity. One of the most common bases for future adversity is one defendant's decision to cooperate with the government in exchange for leniency or a plea deal.

In such scenarios, the question becomes to what extent the remaining defendant(s) can use information exchanged via the JDA to undermine the cooperating defendant's testimony. If one defendant intends to cooperate with the government, the lawyer for the remaining defendant arguably has a conflict of interest. Even if the lawyer was careful to avoid entering into an actual attorney-client relationship with the cooperating defendant, the lawyer may still owe a duty of confidentiality to the cooperating defendant. It therefore is important to include a conflict waiver in the JDA allowing any information exchanged to be used to cross examine any defendant who chooses to cooperate.⁹

5. Conclusion

JDA's should not be viewed as some sort of magic ticket allowing a group of people to speak freely and with impunity. Even with an agreement in place, great care must be taken in deciding what is and is not shared with other parties. Lawyers should not forget that JDA's are, in large part, a tool made necessary by the fact that there is too much potential adversity between the defendants for them to be represented by a single lawyer.

question was not originally made by or addressed to the objecting member.... Any member may waive the privilege with respect to that person's own communications. Correlatively, a member is not authorized to waive the privilege for another member's communication.

Restatement (Third) of the Law Governing Lawyers § 76, cmt. g. (2000).

⁹ See *United States v. Stepney*, 246 F. Supp. 2d 1069 (N.D. Cal. 2003) (calling for this approach); see also ABA Formal Op. 95-395 (opining that lawyers do not have ethical obligations to the other (non-client) parties to a JDA, but likely do have fiduciary obligations to such parties).

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Vince Farhat has extensive jury trial experience and focuses his practice on representing companies in criminal and civil investigations and prosecutions by government enforcement agencies, as well as healthcare enforcement matters and complex federal litigation. He also advises companies in connection with complex and sensitive internal investigations.

Before joining Holland & Knight, Mr. Farhat served as an Assistant U.S. Attorney in the Major Frauds Section in the U.S. Attorney's Office for the Central District of California. As an AUSA, Mr. Farhat gained insight and expertise in the area of professional responsibility and ethics in white collar criminal practice, including disqualification motions, the duty to protect client confidences, conflicts of interest, the attorney-client privilege and work-product doctrine, the duty of candor, advice of counsel defense, and other matters implicating criminal law ethics.



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Peter Jarvis co-chairs Holland & Knight's Legal Profession Team. He practices primarily in the area of attorney professional responsibility and risk management. He advises lawyers, law firms, corporate legal departments and government legal departments about the law governing lawyers. This includes, but is not limited to, matters relating to conflicts of interest, duties of confidentiality, other legal or professional ethics issues, advice on the avoidance of civil or criminal liability, law firm breakups, and questions relating to law firm or legal department structure and operation. Mr. Jarvis also serves as an expert witness and is an avid lecturer for public and private/in-house continuing legal education seminars.

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Ms. Martin Rhodes was a deputy district attorney in the District Attorney's Office for the Portland metropolitan area for seven years. During that time she was assigned to the Domestic Violence and, later, the Gang Crimes Unit with liaison responsibilities for state and federal law enforcement agencies on the Gang Enforcement Team. In that capacity she first chaired dozens of felony jury trials and hundreds of cases. She was cross designated as a Special United States Attorney under the Project Safe Neighborhoods gun enforcement agenda. Ms. Martin Rhodes emerged to the private sector as an ethics attorney after heading a two year investigation and six week trial of an attorney accused of conspiring with his client to advance a perjured alibi.

Ms. Martin Rhodes is the co-author, together with Ron

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