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ENFORCEMENT

BNA Insights: The Yates Memo and the Future of Joint Defense Agreements

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Joint defense agreements are a fundamental element of many contemporary corporate representations. These agreements allow multiple parties to pool resources, coordinate strategy, and avoid duplication of work. And in the context of alleged corporate wrongdoing, they facilitate internal investigations and fact-finding by the company. But recent changes to Department of Justice (''DOJ'') policies raise serious questions about the future of joint defense agreements in the criminal context. Specifically, DOJ will no longer give *any* cooperation credit to corporations seeking leniency unless they divulge all facts about individual employee misconduct. This new requirement may make it difficult—or even impossible—for companies and their officers to establish joint defense agreements by destroying any common interest between a company seeking cooperation credit and an individual officer fighting allegations of wrongdoing. At the very least, counsel representing both companies and individuals should be aware of the policy change and the effects it could have on their clients, on internal investigations, and on information sharing.

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I. The Yates Memo

On September 9, 2015, DOJ revised its policies related to cooperation credit and decisions regarding the charging of individuals in the context of corporate wrongdoing.[1] The guidelines, formally released in a memo written by Deputy Attorney General Sally Quillian Yates (''the Yates Memo''), are the product of a DOJ working group that examined the Department's approach to corporate investigations and cooperation agreements.[2] The Yates Memo suggests that investigating and bringing cases, both criminal and civil, against individuals is a crucial tool to deter illegal activity, to hold the proper parties accountable, and to build public trust in law enforcement.

The increased aggressiveness of the policies announced in the Yates Memo were, in part, a response to

[1] Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice (Sept. 9, 2015) (''Yates Memo''), *available at* http://www.justice.gov/dag/file/769036/download. The changes are also reflected in the U.S. Attorneys' Manual, particularly in 9-28.000 - Principles of Federal Prosecution Of Business Organizations. *See* U.S. Dep't of Justice, United States Attorneys' Manual 9-28.000, *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

[2] Yates Memo at 2.

criticism from politicians, the media, and even some sitting federal judges that DOJ has not done enough to prosecute individual malfeasance following the 2008 financial crisis.[3] But it is also true that the Department has emphasized individual cases in corporate investigations for years, and that the Yates Memo is probably best understood as the continuation or acceleration of that trend, rather than a break with past policy.

For instance, in a 1999 memo (''the Holder Memo'') providing guidance on what factors to consider before bringing charges against a corporation, then-Deputy Attorney General Eric Holder wrote: ''Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation.''[4] Another guidance memo, originally released by Deputy Attorney General Larry Thompson in 2003,[5] made the same point, which persisted even as the memo was revised and reissued by Deputy Attorney General Paul McNulty in 2006 and Deputy Attorney General Mark Filip in 2008.[6] As recently as May 2015, Assistant Attorney General Leslie Caldwell hinted at one of the core provisions of the Yates Memo when she explained that ''[c]ompanies must provide a full accounting of the known facts about the conduct or events under review, and affirmatively must identify responsible individuals'' in order to receive cooperation credit.[7]

The Yates Memo, as a culmination of these pronouncements, includes both reminders of existing best practices and tangible changes to Department policy, all designed to increase the focus on individual accountability.[8]

Arguably the Yates Memo's most important change, particularly in the context of joint defense agreements, is the requirement that companies must disclose ''all relevant facts about individual misconduct'' to receive ''*any* consideration for cooperation.''[9] Previously, the government awarded credit to corporations on a spectrum, based on the degree of cooperation. The Yates Memo apparently ends that practice. Instead, as Deputy Attorney General Yates explained during remarks at the New York University School of Law announcing the guidelines, ''[i]t's all or nothing.''[10] To receive cooperation credit, companies must now ''identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide . . . all facts relating to that misconduct.''[11]

Under the new guidelines, corporations also must actively investigate wrongdoing if they want cooperation credit. The Yates Memo states that ''[i]f a company seeking cooperation credit declines to learn of such facts or to provide [DOJ] with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor.''[12] According to Yates, a company cannot ''plead ignorance'' and is required to ''investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals.''[13]

The Yates Memo also announced two policy changes that will make it more difficult to avoid individual prosecutions during the resolution of corporate investigations. First, absent ''extraordinary circumstances or approved departmental policy,'' DOJ attorneys should not enter into a corporate resolution that includes an agreement to immunize or dismiss charges against individual officers or employees. This policy extends to the civil context, and the government will not release either criminal or civil claims against individuals based on a settlement agreement with a corporate entity absent ''extraordinary circumstances.''[14] Any release in contravention of this policy must be personally approved—in writing—by the relevant Assistant Attorney General or United States Attorney.

Second, corporate investigations should not be concluded without a clear plan for dealing with related individual cases. If an investigation into individual misconduct is ongoing when the government attorneys

[3] *See*, *e.g.*, Ryan Tracy & Victoria McGrane, *Warren Faults Banking Regulators for Lack of Criminal Prosecutions*, Wall St. J. (Apr. 15, 2015), http://blogs.wsj.com/law/2014/09/09/warren-faults-banking-regulators-for-lack-of-criminal-prosecutions/; Editorial, *Talking Tough With the Banks*, N.Y. Times, Feb. 20. 2015, at A18; Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. Rev. Books (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/.

[4] Memorandum from Eric Holder, Deputy Attorney General, U.S. Dep't of Justice (June 16, 1999), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

[5] Memorandum from Larry Thompson, Deputy Attorney General, U.S. Dep't of Justice (Jan. 20, 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf (''Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation.'')

[6] Memorandum from Paul McNulty, Deputy Attorney General, U.S. Dep't of Justice (Dec. 12, 2006), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf (same); Memorandum from Mark Filip, Deputy Attorney General (Aug. 28, 2008), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf (same).

[7] Leslie Caldwell, Assistant Attorney General, U.S. Dep't of Justice, Remarks at the Compliance Week Conference (May 19, 2015) (transcript available at http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-compliance-week-conference).

[8] Recently, DOJ again emphasized the importance of individual prosecutions in corporate investigations. On April 5, 2016, the Fraud Section released a new set of policies and a one-year pilot program that seek to clarify when a corporation may qualify for cooperation credit in a Foreign Corrupt Practices Act (''FCPA'') matter voluntarily self-disclosed to the Fraud Section. *See* Memorandum from Andrew Weissmann, Chief, Fraud Sec., Crim. Div., U.S. Dep't of Justice (Apr. 5, 2016), *available at* https://www.justice.gov/criminal-fraud/file/838416/download. The document references the Yates Memo repeatedly, *see id.* at 2, 4-8, and suggests that the new guidelines will build on the Yates Memo's goals by ''increas[ing] the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.'' *Id.* at 2.

[9] Yates Memo at 3 (underline in original).

[10] Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015) (''Yates Remarks'') (transcript available at http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school).

[11] Yates Memo at 3.

[12] *Id.*

[13] Yates Remarks.

[14] Yates Memo at 5.

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seek authorization to resolve the corporate case, ''the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct . . . and an investigative plan to bring the matter to resolution.''[15] Further, any decision not to bring civil or criminal charges against those individuals must be described in writing and approved by the relevant Assistant Attorney General or United States Attorney, or their designee.[16]

II. General Principles on Joint Defense Agreements

The clear upshot of the Yates Memo—that companies risk losing *all* cooperation credit if they fail to provide DOJ with all (non-privileged)[17] evidence incriminating any current or former executive or employee at the company—raises the question of whether companies cooperating in a DOJ investigation and the employees involved in those investigations can possibly share a common interest sufficient to sustain the protected sharing of privileged information between their respective counsel that occurs under joint defense agreements. These agreements, also known as common interest agreements, permit parties with common interests to work together without risking the waiver of attorney-client privilege or the work product doctrine. However, in an ''all or nothing'' world where cooperation credit now turns entirely on a prosecutor's perception that a corporation's cooperation in marshalling evidence of individual wrongdoing is complete and unqualified, counsel for both the company and for separately represented individuals should proceed more cautiously with joint defense agreements, as the divergence of interests created by the Yates Memo could both place the prospect of cooperation credit in jeopardy, and place privileged communications shared pursuant to those agreements at risk of losing their privileged status.

A. The Law of Joint Defense Agreements

It is a basic tenet of the attorney-client privilege that the protection of the privilege is generally waived when privileged materials or communications are shared with a third party. But an absolute interpretation of this rule would make it impossible for co-defendants or other aligned parties to work together. Joint defense agreements extend the benefits of the privilege to those cases, but do not create any new or distinct privilege. Instead, joint defense agreements simply extend the protection of existing attorney-client relationships in situations where parties, including individuals and organizations, are closely aligned. Under the umbrella of a joint defense agreement, the parties to the agreement can share protected information without fear that the exchange will act as waiver. The shared protection promotes efficiency and efficacy, and often permits parties to present a united front against government investigators. Attorneys within the group can divide responsibilities, share facts learned from clients, and ensure that they do not undercut each other's positions.

Despite these obvious benefits, joint defense agreements did not enter modern jurisprudence until the 1960s, when the Ninth Circuit pioneered the contemporary use of the doctrine. In 1965, the Ninth Circuit explained: ''The rule . . . is that where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.''[18] Over time, the doctrine spread to other jurisdictions and broadened in scope. The First, Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits have each recognized the joint defense privilege, with some variations, and no circuit has rejected the privilege.[19] All fifty states have similarly recognized some form of the joint defense or common interest doctrine.[20]

For a communication made under a joint defense agreement to be protected, the party asserting the privilege must establish the basic elements of the attorney-client privilege and that ''(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.''[21] Crucially, ''the common interest doctrine . . . is limited strictly to those communications made to further an ongoing enterprise.''[22]

The precise meaning of common interest is unclear, and various Circuits interpret the term differently. In general, communications ''should be privileged to the extent that they concern common issues and are in-

[15] *Id.* at 6.

[16] The early implementation of the Yates Memo raises some questions about how the policy will be applied in practice. For instance, W. Carl Reichel, the former president of Warner Chilcott's pharmaceuticals division, was arrested in October 2015 in connection with the company's global settlement resolving civil and criminal liability arising from illegal drug marketing. DOJ's announcement of these charges suggested that this action was a by-product of the new policy embodied by the Yates Memo. *See* Jeff Overley, *Ex-Warner Chilcott Exec Charged in Kickback Scheme*, Law360 (Oct. 29, 2015, 1:43 PM), http://www.law360.com/articles/720751/ex-warner-chilcott-exec-charged-in-kickback-scheme. On the other hand, Morgan Stanley's $3.2 billion settlement of claims that it misrepresented the risk of mortgage-backed securities does not appear to have triggered any individual charges, raising some criticism as to whether the Yates Memo will actually have teeth. *See* Evan Weinberger, *Yates Memo Fails to Trigger Charges in Morgan Stanley Deal*, Law360 (Feb. 11, 2016, 8:10 PM), http://www.law360.com/articles/758250/yates-memo-fails-to-trigger-charges-in-morgan-stanley-deal.

[17] The U.S. Attorneys' Manual makes clear that ''a company is not required to waive its attorney-client privilege and attorney work product protection in order'' to receive cooperation credit. U.S. Dep't of Justice, United States Attorneys' Manual 9-28.700, *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.700.

[18] *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

[19] *See* 21 Marvin Pickholz et al., *Securities Crime* § 4:25.

[20] *See* Craig S. Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 Notre Dame L. Rev. 1449, 1492 (2002).

[21] *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (citing *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381 (S.D.N.Y. 1975)).

[22] *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815-16 (7th Cir. 2007).

tended to facilitate representation.''[23] Some courts have held, however, that parties ''need not have identical interests and may even have some adverse motives,''[24] while others require that the interests be ''identical rather than merely similar.''[25] Despite this confusion over how closely parties' interests must be aligned, it seems clear, at the very least, that ''the common interest doctrine does not apply if [the] parties have an incentive to blame each other for alleged wrongful conduct.''[26]

Joint defense agreements are permitted in a much wider range of contexts today than they were in the 1960s. Modern cases recognize that joint defense agreements can operate equally in the criminal and civil context, and even plaintiffs may be permitted to join together in parallel common interest agreements. As the Fourth Circuit explained, ''[w]hether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is *civil or criminal*, the rationale for the joint defense rule remains unchanged.''[27] Further, a joint defense agreement may be written or oral.[28]

Within a joint defense agreement, the privilege covers all communications made within the scope of the common interest to any counsel, not just a party's own attorney. Although the specific terms of a joint defense agreement can be modified in writing, the general rule is that the privilege protecting communications covered by the joint defense agreement can only be waived with the consent of every member of the group. In other words, the agreement ''prevents disclosure of a communication made in the course of preparing a joint defense by the third party to whom it was made.''[29] Several jurisdictions have held that a party retains control over its own communications, however, so it can waive the privilege for those statements, but not the communications of others.[30]

The privilege and the requirement to protect confidential information remains in force even after a party withdraws from the agreement.[31] Collapsing joint defense agreements, therefore, often raise conflicts of interest. Courts have split, for example, on whether defense counsel can use information gained through the joint defense agreement to cross-examine a party who withdrew from the agreement.[32] In some situations, this limitation could make it impossible for the attorney to adequately represent their client, forcing them to withdraw from the case.

B. Government View of Joint Defense Agreements

Notwithstanding well-settled principles recognizing the importance of joint defense agreements, government lawyers at DOJ and other agencies often take a dim view of them. Commentators have suggested that joint defense agreements make prosecutors uneasy because they worry that coordination between defendants will hide relevant evidence from the government and the court and could raise the risk of obstruction, witness tampering, or the continuations of ongoing malfeasance.[33]

The Department's official policy on joint defense agreements has changed over time. Following the 1999 Holder Memo, a company's decision to form a joint defense agreement was to be considered by the government when deciding whether to bring charges against the company itself. According to the Holder Memo, ''a corporation's promise of support to culpable employees and agents . . . through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.''[34]

The current edition of the United States Attorneys' Manual takes a more protective approach, stating that ''the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements.''[35] The Manual goes on, however, to warn that ''the corporation may wish to avoid

[23] *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

[24] *United States v. Gonzalez*, 669 F.3d 974, 980 (9th Cir. 2012).

[25] *In re Rivastigmine Patent Litig.*, No. 05 MD 1661 (HB/JCF), 2005 WL 2319005, at *2 (S.D.N.Y. Sept. 22, 2005) (citing, *inter alia, Bank of America, N.A. v. Terra Nova Insurance Co.*, 211 F. Supp. 2d 493, 496 (S.D.N.Y. 2002)).

[26] *McNally Tunneling Corp. v. City of Evanston*, No. 00 C 6979, 2001 WL 1246630, at *3 (N.D. Ill. Oct. 18, 2001); *see also United States v. Gonzalez*, 669 F.3d 974, 981 (9th Cir. 2012) (noting that a JDA ''ended at least by the time Gonzalez decided to pursue his own defense and blame Paiz for the crime (thus ending their common legal interests)'').

[27] *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (emphasis added).

[28] *See Am. Mgmt. Servs. v. Dept. of the Army*, 703 F.3d 724, 733 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 62 (2013) (''The common interest doctrine does not require a written agreement, . . . [h]owever, there must be an agreement or a meeting of the minds.'').

[29] *In re Grand Jury Subpoena*, 274 F.3d 563, 573 (1st Cir. 2001).

[30] *See*, *e.g.*, *id.* at 572-73.

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

[32] *Compare United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (''A joint defense agreement establishes an implied attorney-client relationship with the co-defendant. . . [which] can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue. . . .'') *with United States v. Almeida*, 341 F.3d 1318, 1323-26 (11th Cir. 2003) (holding that the cooperating party waived the privilege by cooperating with the government and that ''the mere inability to utilize the privileged communications is not itself a manifestation of a conflict of interest, because no lawyer in the world could utilize those communications.'').

[33] *See The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations: A Report Prepared by the American College of Trial Lawyers*, 41 DUQ. L. REV. 307, 327 (2003) (''The agreements, however, still make prosecutors 'uneasy.' ''); Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 879 (1996) (''Prosecutors oppose confidentiality for joint defense communications, because it shields relevant and probative evidence from the fact finder thereby hindering the determination of criminal responsibility of those accused of a crime. Prosecutors also fear that joint defense arrangements may include unlawful efforts to impede justice, provide a group of co-defendants with the opportunity to influence improperly the memories of witnesses, or otherwise permit a concerted attempt to obstruct grand jury investigations.'').

[34] Holder Memo at 6.

[35] U.S. Dep't of Justice, United States Attorneys' Manual 9-28.730, *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.730.

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putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit.''[36]

On occasion, the government seeks to pierce or evade joint defense agreements. For instance, one court ordered the SEC, over the agency's objection, to destroy all copies of documents unilaterally turned over by one party to a joint defense agreement, without the other party's consent.[37] In another case, counsel for JPMorgan Chase turned over notes and memoranda summarizing interviews of employees that were created during an internal investigation.[38] Separate counsel for the employees and the company had reached a verbal joint defense agreement, but the court ruled the employees waived the privilege when they agreed to go forward with the interview even after the company's counsel said the company ''would waive the privilege if the government pushed.''[39] And in a pending case against Pacific Gas and Electric Company (''PG&E''), DOJ recently filed a motion under Rule 17 seeking information on 28 current and former PG&E employees, including ''all records and communications'' about their hiring and payment of counsel, for the purpose of showing ''potential bias.''[40] In opposing the motion, PG&E argued that the request seeks materials protected by the joint defense privilege and is designed to ''penalize those individuals—none of whom are charged with committing any crime—for exercising their right to counsel.''[41]

III. Joint Defense Agreements After the Yates Memo

In the wake of the Yates Memo, DOJ has not announced any specific changes in policy regarding joint defense agreements entered into between companies and employees. However, given the clear ''all or nothing'' threat posed by the Memo, companies will no doubt begin to balance the benefits of joint defense agreements against the potential loss of cooperation credit that may result if the government decides a company has not sufficiently implicated individual employee wrongdoers. The Yates Memo's directive to disclose ''all relevant facts about individual misconduct'' and its warning against companies ''pick[ing] and choos[ing] what facts to disclose''[42] could lead a prosecutor to view a company's election to obtain certain facts through certain witnesses through a joint defense agreement (and thus not subject to disclosure to the government) a form of ''picking and choosing'' facts for disclosure. Indeed, companies in cooperation mode should be fully prepared for a request from the prosecutor to identify all joint defense agreements the company has entered into with its former and current employees.[43]

In addition to its chilling effect on *entering* into joint defense agreements, the Yates Memo will likely chill the sharing of facts pursuant to any such agreement. This is because the existence of a ''common interest'' between the company and the separately represented individuals, and thus the enforceability of a joint defense agreement based upon that common interest, could be vulnerable to attack. If a corporation determines early in the investigation that it plans to cooperate with the government, how can it have a common interest with any of its officers or employees who have not reached the same conclusion? Without a common interest between the company and an individual who has disclosed information to the company under the cloak of a joint defense agreement, the government could argue that the individual waived privilege as to that information when it shared it with the company because there was no common interest that would have supported an enforceable joint defense agreement. Indeed, companies conducting internal investigations are already beginning to include in joint defense agreements provisions permitting the company to turn over to the government facts it receives from the employee through joint defense communications. Counsel for individuals will no doubt need to be sensitive to this risk, and exercise restraint in what information they are disclosing to company counsel, or perhaps consider whether entering into a joint defense agreement at all. This would not only hinder the company counsel's ability to represent its client but would also impede the government's objective of uncovering all facts relevant to its investigation.

Adding to this uncertainty is the difficulty of determining when an individual no longer holds a common interest with the company. At the onset of an internal investigation, which may be triggered by an internal whistleblower or some other internal alert as opposed to a government inquiry, it is usually impossible to know (1) whether the company will ultimately self-disclose to the government and/or cooperate with any government investigation that may ensue, or (2) whether the individual's interest will be aligned with whatever approach the company elects to take with respect to the government. Under these circumstances, it is usually presumed as an initial matter that the compa-

[36] *Id.*

[37] *SEC v. Nicita*, No. CIV 07CV0772WQHAJB, 2008 WL 170010, at *2-*4 (S.D. Cal. Jan. 16, 2008).

[38] *United States v. LeCroy*, 348 F. Supp. 2d 375, 377 (E.D. Pa. 2004), *as amended on reconsideration* (Jan. 10, 2005).

[39] *Id.* at 380-83.

[40] *Ex Parte* Motion for Rule 17 Subpoena at 2-3, *United States v. Pacific Gas and Electric Company*, No. 14-cr-00175-TEH-1 (N.D. Cal. Feb. 24, 2016), ECF No. 312.

[41] Opposition to Government's *Ex Parte* Motion for Rule 17 Subpoena at 7, 10, *United States v. Pacific Gas and Electric Company*, No. 14-cr-00175-TEH-1 (N.D. Cal Feb. 29, 2016), ECF No. 322.

[42] Yates Memo at 3.

[43] Recent cases suggest that a written joint defense agreement itself will generally be protected by the work product doctrine. ''Indeed, most courts to address the matter have so found or assumed.'' *R.F.M.A.S., Inc. v. So*, No. 06 CIV 13114 VM MHD, 2008 WL 465113, at *1 (S.D.N.Y. Feb. 15, 2008) (collecting cases); *see also Generac Power Sys., Inc. v. Kohler Co.*, No. 11-CV-1120-JPS, 2012 WL 5463913, at *2 (E.D. Wis. Nov. 8, 2012) (determining that a joint defense agreement was protected by the work product doctrine); *McNally Tunneling Corp. v. City of Evanston*, No. 00 C 6979, 2001 WL 1246630, at *4 (N.D. Ill. Oct. 18, 2001) (holding that agreement was covered by both the attorney client privilege and the work product doctrine). The existence of an agreement, however, is generally discoverable. *See Island Intellectual Prop. LLC v. Deutsche Bank AG*, No. 09 CIV. 2675 KBF, 2012 WL 526722, at *12 (S.D.N.Y. Feb. 14, 2012) (''The fact that a joint defense agreement exists is a permissible topic for cross-examination.'').

ny's and the individual's interests are aligned and that a joint defense agreement is appropriate. When one of the parties to the agreement determines during the course of the investigation that those interests have diverged—*e.g.*, when the company decides to cooperate fully with the government while the individual remains adversarial to the government—there is ordinarily a provision in the joint defense agreement that the party must expressly withdraw from the agreement and is thereafter prohibited from disclosing any joint defense material exchanged prior to the withdrawal. However, it is unclear whether prosecutors, assuming they agree to recognize the enforceability of the joint defense agreement *ab initio*, will defer to the parties' determination of the point in time when their interests diverged, and will seek the disclosure of information shared by the individual with the company pre-withdrawal.

The uncertainty created by the Yates Memo threatens to affect the realm of civil litigation as well. To the extent the Yates Memo undermines the common interests between employees and their employer in the criminal context, it may prompt plaintiffs to challenge those agreements in subsequent civil litigation. Plaintiffs may attempt to use the Yates Memo's wedge to claim that an apparent joint defense agreement between employer and employee is invalid and that any protection granted to documents or information shared under the agreement has been waived.

IV. Practice Pointers

In light of the risks to the feasibility and enforceability of joint defense agreements in a post-Yates-Memo enforcement environment, counsel for both companies and individuals should be mindful of the following considerations.

(1) Company counsel should consider the potential benefits of transparency with the government, such as disclosing the individuals with whom they have entered into joint defense agreements. Company counsel should consider seeking feedback from the government on its view of whether particular individuals have common interests with the company and whether it is concerned about the agreement's application in the civil litigation context.

(2) Company counsel should proceed cautiously when deciding to retain separate representation for current employees. Although separate representation may sometimes be required by ethical rules or encouraged by other factors, such as employee distrust of company lawyers, the decision to bring in separate counsel may cause problems where joint defense agreements are at risk. If the company lawyers are representing the employee, shared information is still protected by the privilege. When individuals are represented separately, however, communications must occur under the umbrella of a joint defense agreement, making the continued protections more vulnerable.

(3) Counsel for individuals must exercise care in what information it shares with company counsel and the manner in which that information is shared. The Government may at some point press the company as to whether a joint defense agreement with a particular employee is enforceable, and with the pressure of losing all cooperation cedit looming, the company may be more likely to accede to that pressure.

(4) Although parties often proceed with oral joint defense agreements for fear that a written agreement could be discoverable, a written agreement that sets forth the specific grounds for finding commonality of interests between and among the parties, the terms of withdrawal and post-withdrawal sharing of information, and other relevant contours of the agreement may now be more preferable.

V. Conclusion

Joint defense agreements are a useful tool that allows parties to respond to an investigation in an effective and efficient manner. The structure is particularly useful where a corporation and its officers have a common interest in the resolution of a case, whether it is a government investigation or in defense of private civil litigation. The Yates Memo, particularly the new rule that the DOJ will not give a company any credit for cooperation unless it turns over all facts about individual misconduct, may threaten the future use of joint defense agreements by undermining the common interests that support them. Counsel for both companies and individuals should therefore engage in joint defense communications with caution.

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