

**Ethics Issues Arising from Joint Defense Agreements – An Issue Outline**

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## **I. What is the Joint Defense Privilege?**

- A. Also known as the “common interest” privilege
- B. No express provision in the FRE, but most circuits have adopted it
- C. Allows parties with a common interest to exchange information without waiving attorney-client or work product privileges
- D. Requirements: For the joint defense privilege to exist, must establish at least that:
  - 1. The communications were confidential and made in the course of a joint [defense] effort
  - 2. The parties exchange the information for the purpose of mounting a common defense/prosecution and/or to further the joint [defense] effort
  - 3. The privilege has not been waived by any of the parties to the joint [defense] effort

## **II. General Considerations**

- A. Benefits of a joint defense agreement (JDA)
  - 1. Facilitate a united defense by encouraging cooperation and exchange of information
    - a) “[I]nconsistent defenses condemn one another to failure.” Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 *FORDHAM L. REV.* 871 (1996).
  - 2. Reduce costs
  - 3. Eliminate duplication
  - 4. Sharing
  - 5. Provide an equitable structure/formula for sharing costs
- B. Factors to consider before entering a JDA
  - 1. Exposure – your client and others
  - 2. Status of discovery
  - 3. Whether all necessary parties have been joined
  - 4. Estimated expense of litigation
  - 5. Efficacy of available joint defense theories to limit potential exposure
  - 6. Oral vs written

## **III. Contexts Giving Rise to a JDA**

- A. “Joint Client Doctrine” -- Single attorney for multiple clients

- B. “Allied Lawyer Doctrine” -- Multiple defendants with their own separate attorneys
- C. Joint plaintiff/prosecutorial interest
  - 1. Less widely recognized than joint defense, but privilege has been applied to common interests among plaintiffs:
    - a) *Sedalcek v. Morgan Whitney Trading Group*, 795 F.Supp. 329, 331 (C.D. Cal 1992) (“Whether the jointly interested persons are defendants or plaintiffs...the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.”).
- D. Commonality of legal interest
- E. The privilege is not available for commonality of *commercial* interests
  - 1. If no action is pending, parties should document the purpose of their cooperation, because cooperation for commercial (rather than legal) purposes is not protected. *Sackman v. Liggett Group Inc.*, 920 F.Supp. 357 (E.D. N.Y. 1996).

#### **IV. JDA Ethical Issues**

- A. Existence of common interest
- B. Joint representation issues
- C. Potential for an attorney-client relationship to be found between a lawyer and non-client members of a JDG, which can give rise to issues relating to conflicts, duties, liability, etc.
- D. Protection of privileged/confidential information
- E. Other conflicts issues

#### **V. Ethical Issue 1 -- When Does a Common Interest Exist? Or, With Whom May You Have a JDA?**

- A. For our purposes, two broad contexts in which to examine the issue:
  - 1. Criminal Antitrust Investigation
    - a) Representing the Amnesty Applicant
    - b) Representing the Non-Amnesty Applicant who is actively cooperating with enforcement authorities
    - c) Representing the Non-Amnesty Applicant who is not actively cooperating with enforcement authorities

## 2. Civil Antitrust Lawsuit

### B. JDAs within the context of a criminal antitrust investigation

1. Much less common today as a result of DOJ's Leniency Policy (the Amnesty Program)
2. Situation 1 -- Representing the amnesty applicant
  - a) With alleged co-conspirators, there is no common interest
  - b) With individual employees, where amnesty is available, joint defense is possible
    - (i) May also be jointly represented (see Section VI below)
3. Situation 2 -- Representing the non-amnesty applicant, who is actively cooperating with enforcement authorities
  - a) With alleged co-conspirators, there is no common interest
  - b) With individual employees, there are multiple issues to consider
    - (i) Level of culpability
    - (ii) Likely coverage under any plea agreement
    - (iii) Potential employment action
    - (iv) Joint versus separate representation
    - (v) Necessity of explicit warnings to individuals
    - (vi) Cooperation
  - c) Necessity of explicit warnings -- When representing a company only (and not the employee), counsel must deliver *Upjohn* warning, which should include:
    - (i) Lawyer represents the company, not the individual employee
    - (ii) Information the employee discloses to the lawyer is privileged, but the privilege belongs to the company
    - (iii) The company may unilaterally decide to waive the privilege, and disclose the information
4. Situation 3 -- Representing the non-amnesty applicant who is NOT actively cooperating with enforcement authorities
  - a) With potential co-conspirators, joint defense is possible, but increasingly rare
  - b) With individual employees, multiple issues to consider

### C. JDAs within the context of civil antitrust litigation

1. Does status vis-à-vis a related government investigation matter? Perhaps.
2. Presence of common interest will vary by facts and relationships, and sometimes over time
  - a) Amnesty applicant with co-defendants
    - (i) ACPERA benefits
  - b) Non-amnesty applicant with co-defendants
    - (i) impact of government cooperation?
    - (ii) impact of government plea?

- c) Defendant with non-defendant competitors

**VI. Ethical Issue 2 -- When may an attorney represent more than one party in a matter? The Joint Client Doctrine**

- A. Is it possible to represent both zealously?
- B. Is obtaining consent possible after full disclosure of the risks of multiple representation?
- C. Minimizing effect of potential conflicts
  - 1. Prospective waiver permitting continued representation of one client?
  - 2. “Shadow” counsel?
- D. Memorialization of disclosures and consent -- generally should be in a formal writing
- E. How will attorney-client confidences be treated?
- F. *United States v. Nicholas*, 606 F.Supp.2d 1109 (C.D. Cal. 2009):<sup>1</sup> Firm represented both company and employee. On behalf of company, firm disclosed employee’s statements to the SEC. Employee objected, claiming they were privileged communications. Government argued that they were not protected because the firm gave an *Upjohn* warning. The court expressed doubt that such a warning was given and said even if it was, it did not matter because the firm was representing the employee and an *Upjohn* warning is given to a non-client. Court found the firm had breached its ethical duties by:
  - 1. Failing to obtain written consent for the joint representation
  - 2. Breaching its duty of loyalty by interrogating the employee on behalf of the company without the employee’s proper consent
  - 3. Violating the duty to preserve client confidences by disclosing employee’s privileged communications

**VII. Ethical Issue 3 -- Does an Attorney-Client Relationship Exist Between a Lawyer and Non-Client Members of a Joint Defense Group (“JDG”)?**

- A. No basis for one under the Model Rules of Professional Conduct
  - 1. LEGETH § 1.6-6: “[T] Model Rules impose no special ethical duties that the lawyer owes to these third parties, who are not clients...”

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<sup>1</sup> Although the Ninth Circuit overruled *Nicholas* in *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009), it did not address whether ethical violations actually occurred. It addressed only whether, assuming such violations occurred, they could serve as a basis for suppressing otherwise admissible evidence. The lessons from *Nicholas*, regarding documenting *Upjohn* warnings and obtaining waivers for dual representation, are still instructive.

2. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 95-395 (1995): “A lawyer who has represented one...of the parties in a [JDA] does not thereby acquire an obligation to the other parties...that poses an ethical bar to the lawyer thereafter taking on a related representation adverse to any of the other parties.”

B. Probably a basis for one under agency law

1. “The lawyer will almost certainly have undertaken fiduciary obligations to the other parties [to the JDA]...” ABA Formal Op. 95-395.
2. “The lawyer’s fiduciary duty comes from the law of agency, not the law of ethics...” LEGETH § 1.6-6

C. Some relevant cases

1. *Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977)-- Private antitrust case holding that the receipt of confidential information under a JDA can give rise to an attorney-client relationship so as to preclude an attorney from proceeding against a co-defendant of a former client when the subject matter of the two proceedings is substantially related.
2. *City of Kalamazoo v. Mich. Disposal Serv. Corp.*, 125 F.Supp.2d 219 (W.D. Mich. 2000)--“[A]n attorney in a joint defense situation may find an attorney-client relationship arise[s] with co-defendants as the result of sharing confidential information.”
3. *U.S. v. Henke*, 222 F.3d 633 (9th Cir. 2000) -- Criminal case holding that it is the possession of confidential information of a non-client member of a JDG that gives rise to an implied attorney-client relationship.
4. *Fred Weber, Inc. v. Shell Oil Co.*, 432 F. Supp. 694 (1977)-- Civil antitrust action holding that there is no ground for disqualification where a joint defense was conducted but no evidence showing that the firm in question received confidential information.
5. *Turner v. Firestone Tire & Rubber Co.*, 896 F.Supp. 651 (E.D. Tex. 1995) -- Toxic tort case holding that lawyer’s representation of client in a joint defense setting raises no presumption that the lawyer received confidential information detrimental to co-defendant’s interests.

D. Bottom Line

1. Ethical duty? Likely, no.
2. Fiduciary duty? Yes, based on receipt of confidential information. Main difference in courts’ opinions is whether a JDA creates a presumption of receipt of such information

E. Possible Unintended Obligations to Members of the JDG

1. Lawyer liability: Finding an attorney-client relationship, depending on the type, can lead to such actions as:
  - a) Professional malpractice
  - b) Negligence
  - c) Breach of fiduciary duty
  
2. Example: Lawyer participates in a JDA. He and the other lawyers agree that he will file a motion with three specific arguments. He files the motion but mistakenly omits an argument. The court declines the motion but would have granted it if the third argument had been included.
  
3. Ways to address potential for liability
  - a) Provision in JDA denying attorney-client relationship with non-client members
  - b) Address the use and dissemination of confidential information in the JDA
  - c) Limit involvement in JDG

### **VIII. Ethical Issue 4 -- Protection of Privileged/Confidential Information**

- A. Potential for conflicting duties -- Duty of confidentiality vs. duty of loyalty
  1. Can lead to disqualification, as may implicate a defendant's right to effective assistance of counsel
  
  2. Examples
    - a) A member of a joint defense group (JDG) enters a plea bargain and testifies for the government. Defense counsel still has duty to cross-examine rigorously, but may be impaired by his inability to disclose confidential communications made by the defector.
    - b) Lawyer takes deposition of a witness who has information that would damage a member of the JDG but would help his client. The witness may not be available for future proceedings. From client's perspective, lawyer should draw the information out. From JDG's perspective, he should not.
  
  3. Possible Solution – Waiver
    - a) Defendant-client may be able to waive the conflict
      - (i) He must know that “his counsel may not use or seek to elicit from witnesses information obtained solely under the joint defense doctrine.” *U.S. v. Anderson*, 790 F.Supp. 231 (W.D. Wash. 1992).
      - (ii) Include waiver clause in the JDA stating that client waives any conflict of interest raised by the receipt of confidential information
      - (iii) Could prevent disqualification, though the lawyer may still be limited in cross-examination.
    - b) Waiver solution not always accepted

- (i) Court is not obligated to accept waiver, as it has an independent interest in ensuring effective representation. *Wheat v. U.S.*, 108 S.Ct. 1692 (1988).
- (ii) Conflicts in some circumstances might be unwaivable: “[T]he greater the extent to which [a witness is] significant to the government’s case and the greater the extent to which [a witness] previously communicated confidences to defense counsel under a joint defense agreement, the more likely it is that...the district court will disqualify defense counsel, notwithstanding the defendant’s waiver of any conflict of interest.” Ronald J. Nessim & Paul L. Seave, *Conflicts and Confidences: Does Conflict of Interest Kill the Joint Defense Privilege?*, 7 CRIM. JUST. 6 (1993).

B. Waiver of the privilege

- 1. Some communication among members of a JDG is not protected
- 2. Disclosure of information by one member of a JDG waives the privilege on behalf of other members ONLY as to that member’s own information
- 3. Client-to-client communication without lawyers present is probably not protected.

C. Enforcing the privilege (If a member of a JDA might reveal confidential information)

- 1. Seek injunctive relief
- 2. Move to disqualify counsel
  - a) *Rio Hondo Implement Co. v. Euressti*, 903 S.W.2d 128 (Tex. App. – Corpus Christi 1995, no writ)-- A represented plaintiff, B represented one of the defendants. B’s client settled and B formed a partnership with A. Defendant Rio Hondo moved to disqualify both A and B based on joint defense privilege. The court found no sharing of confidential information and so denied disqualification.
  - b) Where *Rio Hondo* is applied, must establish:
    - (i) That the confidential information has been shared, and
    - (ii) That the matter in which that information was shared is substantially related to the matter in which disqualification is sought.
- 3. Request a protective order

D. Imputation of disqualification to firm

- 1. *Nat’l Med. Enters., Inc. v. Godbey*, 924 S.W. 2d 123 (Tex. 1996)-- Lawyer represented individual hospital administrator and signed JDA with corporation that owned the hospital. Later, lawyer’s firm sought to represent patients suing the corporation. The lawyer was deemed to have confidential information about the corporation through the JDA, and this knowledge was imputed to the firm. Both were disqualified from representing the patients.

2. Possible protective measures:
  - a) Establish screens between the participating lawyer(s) and the rest of the firm as soon as JDA is executed
  - b) Include clause in JDA allowing other members of firm to undertake matters adverse to non-client members of the JDG
  - c) Have individual attorneys sign the JDA rather than signing it on behalf of the firm
  
3. Implementing protective measures still may not be sufficient
  - a) *All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, 2008 U.S. Dist. LEXIS 106619 (N.D. Cal. Dec. 18, 2008) — Attorney acquired confidential information about non-client through a JDA. Attorney's firm merged with another firm, which was handling a case against the non-client. Court imputed disqualification to the new firm, despite the use of an ethical wall and a provision in the JDA waiving future conflicts of interest.

## **IX. Ethical Issue 5 – Other Conflicts Issues**

- A. Example: D firm in JDG represents (or has represented) plaintiff
  1. *Essex Chem. Corp. v. Hartford Accident & Indem. Co.*, 975 F. Supp. 650 (D.N.J. 1997), rev'd, 993 F. Supp. 241 (D.N.J. 1998) -- Essex sues multiple defendants, one of which is represented by Firm A. The defendants enter into a JDA. Essex learns that Firm A represented Essex several years earlier. Other defense counsel's conflicts checks would not have revealed this.
  
- B. Possible disqualification or burdensome hearing where other defense counsel have burden to show they acquired no confidential information from the firm with the conflict.
  
- C. Suggestions to address potential conflicts
  1. Obtain representations from all firms that they have completed thorough conflicts checks
    - a) Does not guarantee no conflicts, but encourages other firms to be thorough
  
  2. Address the use and dissemination of confidential information in the JDA
    - a) Helps if you are later involved in a hearing where you are required to show whether you received confidential information
  
  3. Limit involvement in JDG
    - a) Where possible, don't participate in meetings where facts underlying co-defendant's position is discussed, and stick to drafting motions/pleadings. This also helps if you are required to show you did not receive confidential information.

4. Have individual attorneys sign the JDA rather than signing it on behalf of the firm
  - a) Signing in the firm's name increases the chances that a court will find that the firm has fiduciary obligations to non-client members of the JDG.
5. Provision in JDA denying attorney-client relationship

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C. Rules and Formal Opinions

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2. Model Rules of Professional Responsibility 1.6, 1.7, 1.9