

In Unity There is Strength: The Advantages (and Disadvantages) of Joint Defense Groups

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We must indeed all hang together, or, most assuredly, we shall all hang separately.

—Benjamin Franklin, at the signing of the Declaration of Independence

IT IS NOT unusual today for counsel to be involved in cases with multiple defendants or in multiple cases involving the same defendant. In those types of cases it is often advantageous to work with counsel for the other defendants to prepare and present a joint defense to the pending claims. The best way to do so is to form a joint defense group. This article discusses the advantages associated with forming a joint defense group and the topics to be addressed in a joint defense agreement, identifies possible risks associated with creating a joint defense group, and discusses issues regarding preservation of the joint defense privilege.

I. Why Form a Joint Defense Group?

There are several advantages to forming a joint defense group. Joint defense groups enable each defendant to substantially reduce the costs associated with its defense. These cost savings come in two forms. One is sharing the work: dividing legal research, splitting up the depositions, retaining expert witnesses, contributing paralegals for intensive document reviews.¹ Joint defense groups can also provide huge savings in expensive out of pocket costs. These include the costs of experts, consultants and court reporters. One of the largest costs incurred in “big document” cases is the cost associated with the creation of a computerized database to handle all the documents. Belonging to a joint defense

¹Mark D. Plevin, *Avoiding Problems in Joint Defense Groups*, 23 LITIGATION 41 (Fall 1996).

group allows all defendants to share the sometimes enormous costs associated with creating and utilizing such databases.²

Saving money is not the only benefit to be gained from belonging to a joint defense group. There is also the benefit derived from combining the expertise, knowledge and skills of the attorneys in the group. Some of the lawyers may have specialized knowledge about the substantive law at issue. Others may have experience dealing with the particular industry or business involved. Taken collectively, the joint defense group has deeper knowledge and more expertise than any single defendant's lawyer.³

A third benefit of joint defense groups is the ability to coordinate strategy and tactics. Joint defense groups permit each attorney to fill knowledge gaps in the defense case and minimize the waste of judicial time that results from the presentation of uncoordinated defenses. A joint defense group enables the defendants to speak with one voice, thereby staying on message and avoiding (or reducing) conflict on their side of the case. A joint defense group can also help to ensure that one member's strategy doesn't work at cross-purposes with another's.⁴

There are also drawbacks to participating in a joint defense group—conflicts that are inherent in the very nature of a joint defense effort. Major defendants in the case want to control the defense, in order to protect their large stake in the case. As a result, major defendants often do most of the group's work. Because they have more to lose, major defendants typically invest considerable time and effort in carefully

establishing each possible defense and every basis for each defense. This can be extremely expensive, but for a major defendant the cost of a first class defense often pales in comparison to the potential liability it faces.⁵

Minor defendants have a lesser stake in the litigation. Given their smaller risk of exposure, minor defendants sometimes balk at incurring the costs associated with the gold standard defense the major defendants insist upon. This conflict can easily create dissension within the group and threaten the major defendants' control of the group.⁶

Major and minor defendants also frequently disagree on strategy issues. A minor defendant may want to file an early summary judgment motion which has the potential of eliminating a minor defendant from the case before it gets too expensive, while major defendants may be more interested in having the issue decided later in the case, after discovery has been completed and the record is fully developed. The minor defendant's desire for early resolution again interferes with the major defendant's strategic design and threatens the major defendant's control of the defense.⁷

There may also be a conflict between the major defendants' interest in controlling the defense and their desire to spread the workload around. The major defendants want the other defendants to help carry the burdens associated with litigating the case, but they may not want to share control of the defense. If the other defendants answer a call for help, and become more active in the case, it becomes

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 42–43.

⁶ *Id.* at 43.

⁷ *Id.*

more difficult for the major defendants to continue controlling the defense, since the minor defendants will want more of a say in how the defense is being prepared and presented. Eventually, the major defendants will be forced to decide which is more important to them: saving money or controlling the defense of the case.⁸

Minor defendants often face a mirror-image conflict, between their interest in cost savings and their opposing desire to actively participate in the defense of the case. Minor defendants want to be involved, but not to the extent that they incur huge costs. On the other hand, too much reliance on the group can be disastrous. Minor defendants must be active enough to protect their own interests while at the same time protecting their cash outlays.⁹

Another potential conflict pits the need for group consensus against the need to be proactive. To move forward on any project—whether it is the filing of a dispositive motion, the retention of an expert or the creation of a database—the group must reach consensus. The larger the group, the harder it is to reach consensus in a timely fashion. And the failure to develop a timely consensus leads to missed opportunities, unfiled motions, depositions not taken, discovery not served and initiatives overlooked.¹⁰

II. There Can be no Joint Defense Absent Potential or Actual Litigation

In order for a court to find that a valid joint defense agreement exists, the parties

to the agreement must face actual or potential criminal or civil litigation—and not simply a common problem or shared business interests.¹¹ Absent pending legal action, parties cannot rely upon an ongoing past practice of sharing information to maintain the confidentiality of their communications. There is no such thing as a “standing” or “rolling” joint defense agreement.¹²

In addition, the court will refuse to recognize a joint defense agreement unless the parties objectively agree that they will join forces. The mere impression of one party that other parties are, should or will cooperate does not suffice to prevent the disclosure of their discussions, including any admissions.¹³ Even a general purpose meeting to discuss matters of common

¹¹ See, e.g., *Medcom Holding Co. v. Baxter Travenol Laboratories*, 689 F. Supp. 841, 845 (N.D. Ill. 1988) (“...the privilege arises out of the need for a common defense, as opposed merely to a common problem”); *Metro Wastewater Reclamation v. Continental Casualty Co.*, 142 F.R.D. 471 (D. Colo. 1992) (“...the joint defense privilege arises only where the common interest of the parties relates to the joint defense of existing or impending litigation”); *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357 (E.D.N.Y. 1996), vacated on other grounds, 167 F.R.D. 6 (E.D.N.Y. 1996) (joint defense documents, although prepared by legal counsel, had a predominantly scientific, administrative, business or public relations purpose, rather than a legal purpose, and so were not protected by the joint defense privilege).

¹² *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001) (a joint defense agreement may only be formed with respect to the subject of potential or actual litigation).

¹³ *United States v. Sawyer*, 878 F. Supp. 295, 297 n.1 (D. Mass. 1995) (“...one party’s mistaken belief about the existence of a joint defense does not, and cannot, give rise to a joint defense privilege”); *United States v. Weissman*, 195 F.3d 96 (2d Cir. 1999).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

interest that is not intended to further the common purpose of an enterprise does not necessarily lead to the inference that there is a joint defense agreement.¹⁴

III. Joint Defense Agreements

Although joint defense agreements do not have to be reduced to writing, the better policy is to do so.¹⁵ Reasons to reduce the joint defense agreement to writing include: (1) a written agreement sets out the specific terms that govern the parties to the agreement so that there is no dispute on what is covered by or the scope of the agreement; (2) when a court examines whether the parties were operating as part of a joint defense group, the existence of a written joint defense agreement is strong evidence in favor of a positive finding; (3) written agreements usually clearly define the duties of the parties when someone withdraws or joins the group; and (4) the existence of a written agreement setting forth the parties' common understanding will bolster the argument that communications between the parties were made in the course of a joint defense effort.¹⁶

When drafting a joint defense agreement, counsel should keep in mind that

the court or an opposing party might someday read the agreement. While courts generally hold that joint defense agreements are privileged and protected from disclosure, a court might still order *in camera* review or compel disclosure. Counsel should take a great deal of time and devote a great deal of attention to carefully drafting a top-notch defense agreement.

Key provisions that should be included in a joint defense agreement include:

- (1) The identity of the persons or entities engaged in the common effort;
- (2) A statement that the agreement covers all participating clients, their attorneys, their employees and agents and that the parties share a mutuality of interest in a common legal enterprise directed toward devising a common legal strategy;
- (3) The types of information covered by the joint defense agreement, i.e., witness interviews, legal memoranda, documents, legal strategies, etc., and how they may be used;
- (4) An explicit statement that the communications had or materials shared were confidential prior to disclosure to the parties and that the party sharing such communications or material has an expectation that they will be kept confidential;
- (5) An acknowledgement that any communications that may have occurred prior to the execution of the formal agreement are also subject to the joint defense privilege;

¹⁴ Arnold R. Rosenfeld, *Considerations for Joint or Common Defense Agreements*, 32 M.L.W. 2591, August 2, 2004; *Weissman*, 195 F.3d at 99.

¹⁵ See, e.g., *In re Grand Jury Subpoena*, 274 F.3d at 563 (rejecting a claimed oral joint defense agreement that was unsupported by any evidence of the agreement other than a lawyer's affidavit); *In re Beville*, Bresler & Schulman, 805 F.2d 120, 126 (3rd Cir. 1986) (rejecting claim of joint defense privilege where claimant produced no evidence the parties had agreed to pursue a joint defense strategy).

¹⁶ Rosenfeld, *supra*, note 14.

- (6) A specific statement that shared materials should be used solely for joint defense purposes;
- (7) The procedures to be followed when subpoenas, court orders or other demands are made for materials protected by the joint defense agreement;
- (8) A process for communicating and maintaining the confidentiality of information to third parties necessary for the defense of the common effort, such as consultants, investigators and experts;
- (9) A statement that communications or materials that fall within the attorney-client privilege or work product doctrine can be disclosed or revealed only to members of the joint defense group or approved non-members;
- (10) An acknowledgement that each party is represented exclusively by his or her own attorney and not by counsel for any cooperating party;
- (11) A provision that parties may not disclose any information given by reason of the joint effort without the consent of all the parties;
- (12) A provision that parties are expressly barred from using shared information in a manner adverse to any other party to the agreement;
- (13) A provision that unauthorized disclosure by one party shall not affect the rights of the other parties to the agreement;
- (14) A statement that although the parties agree to share information, no party is obligated to share all of the information in its possession;
- (15) A discussion of when the parties may use their own confidential information in the common effort or in adverse efforts;
- (16) A waiver by participating clients of any conflict of interest claim or right to disqualify against any attorney who receives confidential information pursuant to the agreement;
- (17) A repudiation of the existence of any duty of loyalty (as opposed to a duty of confidentiality) between an attorney for anyone other than the attorney's own client;
- (18) A representation that all of the attorneys have performed thorough conflict checks (in order to reduce the risk of vicarious disqualification);
- (19) A statement of the process for terminating participation in the agreement (including expulsion) which provides for the return of privileged materials and for the continuation of the withdrawing party's obligation to keep confidential that information received while a party to the agreement;
- (20) An agreement by all parties to be bound by the confidentiality provisions even after the agreement terminates, a party withdraws or is expelled, or the action is terminated;
- (21) Provisions for modification of the agreement (all amendments or modifications should be in writing and signed by the parties);
- (22) Provisions for the addition of parties to the agreement;

- (23) Provisions that detail the allocation of fees and costs (dividing costs proportionally, based on the size of each defendant; dividing costs flatly by the number of parties; dividing costs based on the work performed by each defendant);
- (24) A agreement that parties cannot join in motions for which they have neither taken the laboring oar or shared the cost;
- (25) A provision that each party to the agreement retains complete independence and discretion with respect to any decision to resolve the pending litigation without the need for the other parties' consent;
- (26) A provision that requires a party who determines that it no longer has mutuality of interest or enters into an agreement with the adversary to so notify the other parties to the agreement in writing;
- (27) A provision that provides for the final payment of fees and costs when a defendant withdraws from the agreement or settles with the plaintiff;
- (28) A statement that when a member of the joint defense group settles, the information that the party has will be preserved for the group's access;
- (29) An explanation that statutes of limitations will be tolled as to claims that parties to the agreement could assert against each other;
- (30) A clause that discusses the remedies for breach of the agreement (specific performance and/or injunctive powers to prevent disclosures);
- (31) A statement that the agreement itself is confidential;
- (32) A statement that the agreement will not be admissible in the instant litigation, or any other litigation, except in the case where a party seeks to have the terms of the agreement enforced; and
- (33) A statement that the parties' signatures to the agreement represents a certification that counsel has explained the agreement to each party and the parties agree to abide by the understandings contained therein.¹⁷

Understandably, not every provision listed above will be included in every joint defense agreement. The particulars of each agreement will vary greatly depending on the nature of the case, the facts and the parties' unique goals. Special consideration should also be given to seeking court approval of the joint defense agreement. Counsel should ask the court, in its case management order, to include express recognition of the joint defense agreement, the joint defense privilege and protection for joint defense activities.¹⁸ As one set of commentators has noted:

¹⁷ Patrick M. Ryan, *Joint-Defense Agreements Hidden Dangers*, March 28, 2006, available at <http://library.findlaw.com/2003/Dec/17/133240.html>; Thomas G. Pasternak and R. David Donoghue, *Making Joint Defense Agreements Work*, 34 LITIGATION 26 (Summer 2008); Rebecca J. Wilson and Elizabeth A. Houlding, *Using Joint Defense Privilege Agreements in Parallel Civil and Criminal Proceedings*, 68 DEF. COUNS. J. 449, 453 (October 2001); David H. Wright, *Preserving the Joint Defense Privilege: Is the Privilege Safe When a Codefendant Files Bankruptcy?* IN-HOUSE DEFENSE QUARTERLY, 12 (Winter 2010).

¹⁸ Plevin, *supra*, note 1, at 43.

There is a risk that the court will not approve the agreement, but you are clearly better off learning that the court does not believe a privilege exists early in the case rather than after you have exchanged substantial communications under a mistaken expectation of privilege. Having court approval from the start of the litigation establishes the privilege before extensive communications and prevents the initial scare when plaintiff challenges the joint defense agreement after the co-defendants have shared substantial information.¹⁹

Can non-litigants (such as potential targets who have not yet been sued or parties in the supply chain) be included in a joint defense group? Surprisingly, some courts have answered that question in the affirmative. Where non-litigants have a sufficient expectation of eventual litigation, courts are generally willing to include non-litigants within the joint defense privilege.²⁰

IV. Joint Defense Privilege

The joint defense privilege (also known as the “common interest doctrine,” “common interest arrangement doctrine” or the “pooled information doctrine”) is considered an extension of the attorney-client

privilege and the work product doctrine.²¹ It is not a separate privilege and creates no independent protection for documents or information not otherwise protected.²² The joint defense privilege generally allows a defendant to assert the attorney-client privilege to protect his statements made in confidence not only to his own lawyer, but to an attorney for a co-defendant for a common purpose related to the defense of both.²³ Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.²⁴ To maintain the privilege, the common interest must relate to litigation or a legal interest, and not some business, commercial or financial interest.²⁵

Although the joint defense privilege was initially developed to protect communications between co-defendants in criminal cases, it has been expanded to cover a wide variety of situations involving multiple parties with a common defense or claim. The courts have broadly construed the term “co-defendants” and they have extended the joint defense privilege to civil co-defendants;²⁶ companies individually summoned before a grand jury and who provided information before any indictment was

¹⁹ Pasternak and Donoghue, *supra* note 17, at 28.

²⁰ See *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989); *United States v. AT&T*, 642 F.2d 1285 (D.C. Cir. 1980) (parties have strong enough common interests to share trial preparation materials where the parties in the common defense arrangement anticipate litigation against a common adversary on the same issues); *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 2007 WL 1302765 (N.D. Ill. May 1, 2007) (a common interest could exist before a suit was filed and non-litigants with an expectation of suit could be part of a joint defense agreement).

²¹ *In re Grand Jury Witnesses*, 979 F.2d 939 (2d Cir. 1992); *United States v. Evans*, 113 F.3d 1457 (7th Cir. 1997).

²² See, e.g., *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3rd Cir. 1992).

²³ *Country Life Insurance Co. v. St. Paul Surplus Lines Insurance Co.*, No. 03-1224, 2005 WL 3690565 (C.D. Ill. Jan. 31, 2005).

²⁴ *Id.*

²⁵ *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 689 F. Supp. 841 (N.D. Ill. 1988); *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437 (S.D.N.Y. 1995).

²⁶ *Western Fuels Ass'n Inc. v. Burlington Northern R.R. Co.*, 102 F.R.D. 201 (D. Wyo. 1984).

returned;²⁷ potential co-parties to prospective litigation²⁸ and civil defendants who were sued in separate actions.²⁹ The joint defense privilege is not reserved solely for defendants; it has also been applied to multiple *plaintiffs* who communicated with each other in a civil case.³⁰

Courts that recognize a joint defense privilege generally require the following criteria for its application to communications allegedly protected by the attorney-client privilege:

- All of the participants must be pursuing a common defense in existing or anticipated litigation;
- The protected communications must relate to a common issue;
- The protected communications and sharing of information must further existing or potential legal representation in pursuit of the common defense;
- The communications must be made with an expectation of confidentiality; and
- The privilege has not been waived.³¹

There are different considerations involved when a joint defendant is asserting the work product doctrine. When claiming that material is protected by the work product doctrine, a joint defendant must be prepared to demonstrate the following:

- The underlying doctrine is applicable to the communication or material as either “ordinary” work product or “opinion” work product, meaning communication or documents implicating the mental impressions, conclusions, opinions or legal theories of an attorney;
- The parties had entered into an agreement, made before the communication, to keep the communication confidential;
- The parties had an agreement to pursue a joint defense strategy;
- At the time that the communication was prepared, there was a substantial probability of litigation; and
- If the communication was prepared in anticipation of a prior lawsuit, how the previous lawsuit is closely related in parties or subject matter to the present proceedings.³²

Federal courts have widely recognized the joint defense privilege. The Ninth Circuit Court of Appeals was the first court to recognize the privilege, forty-six years ago, in *Continental Oil Co. v. United States*.³³ Other circuit courts have generally followed the Ninth Circuit’s lead.³⁴

²⁷ *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964).

²⁸ *In re LTV Sec. Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981).

²⁹ *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960).

³⁰ *Schachar v. American Academy of Ophthalmology*, 106 F.R.D. 187 (N.D. Ill. 1985).

³¹ *United States v. AT&T Co.*, 642 F.2d 1285 (D.C. Cir. 1970); *U.S. v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979); *Haines*, 975 F.2d at 81.

³² *Wright, supra*, note 17, at 12.

³³ *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964).

³⁴ *United States v. Bay State Ambulance & Hospital Rental Serv.*, 874 F.2d 20 (1st Cir. 1989); *Schwimmer*, 892 F.2d at 237; *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d at 120; *In re Grand Jury Subpoenas*, 902 F.2d at 244; *United States v. Stotts*, 870 F.2d 288 (5th Cir. 1989); *United States v. Keplinger*, 776 F.2d 678 (7th Cir. 1985); *John Manville & Co. v. Local Union 304A of the United Food & Commercial Workers AFL-CIO*, 913 F.2d 544 (8th Cir. 1990); *United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985); *In re Sealed Case*, 29 F.3d 715 (D.C. Cir. 1996).

The joint defense privilege is also widely recognized in state court proceedings. Almost 140 years ago, Virginia first fashioned such a privilege in *Chahoon v. Commonwealth*.³⁵ Although the privilege was originally fashioned by judicial recognition, several states have codified the privilege.³⁶ The party seeking to establish the applicability of the privilege bears the burden of proving its applicability.³⁷ There is a split in authority over whether the privilege applies when clients have conversations between themselves, outside the presence of counsel.³⁸

Inasmuch as the joint defense privilege requires that the parties demonstrate a commonality of interest, does a divergence of the interests of the defendants in any respect defeat the privilege? Some courts have held that a divergence of interests will defeat the

privilege.³⁹ However, a majority of the courts that have considered the issue have held that the parties need not demonstrate an identical identity of interests in order to avail themselves of the protections afforded by the joint defense privilege.⁴⁰

One of the major concerns with the joint defense privilege is whether one defendant can waive *another* defendant's privilege. Courts are split over who can actually waive the privilege. Some courts hold that each co-defendant can waive privilege only with respect to its own communications.⁴¹ If communications have been mixed, then all of the communicating parties must waive the privilege for an effective waiver, unless the non-waiving parties' contributions can be redacted.⁴² Other courts require all co-defendants to consent to a waiver of the privilege.⁴³ Courts that follow this

³⁵ 62 Va. 21 Gratt 1036 (1871).

³⁶ See generally, Susan Rushing, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1276 n.22 (1990)(listing states and discussing the doctrine).

³⁷ *Haines*, 975 F.2d at 81; *United States v. Weissman*, 1996 WL 737042 (S.D.N.Y. 1996); *Sec. Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433 (S.D.N.Y. 1997)(holding that the party seeking to invoke the joint defense privilege had the burden of establishing the existence of a joint defense and the non-waiver of the privilege).

³⁸ Compare *United States v. Gotti*, 771 F. Supp. 535 (S.D.N.Y. 1991) (conversations of clients between themselves, outside the presence of counsel, is *per se* beyond the scope of the joint defense privilege) with *Matter of Grand Jury Subpoenas Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381 (S.D.N.Y. 1975) (counsel does not necessarily have to be present when the communications are made).

³⁹ See, e.g., *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974) (key consideration is that nature of interest be identical, not similar, and be legal, not solely commercial); *Union Carbide Corp. v. Dow Chemical Co.*, 619 F. Supp. 1036 (D. Del. 1985).

⁴⁰ See, e.g., *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979); *Eisenberg v. Gagnon*, 766 F.2d 770 (3rd Cir. 1995).

⁴¹ See, e.g., *Great American Surplus Lines Ins. Co. v. Ace Oil Co.*, 120 F.R.D. 533 (E.D. Cal. 1988); *Western Fuels*, 102 F.R.D. at 201; *Interfaith Hous. Delaware, Inc. v. Town of Georgetown*, 841 F. Supp. 1393 (D. Del. 1994) (in a joint defense agreement, waiver by one member of the group does not waive privilege for the other members).

⁴² Pasternak and Donoghue, *supra*, note 17, at 29.

⁴³ See, e.g., *In re Grand Jury Subpoenas 89-3 & 89-4*, 902 F.2d 244 (4th Cir. 1990) (common defense privilege cannot be waived without the consent of all parties); *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990)(same).

approach hold that when a single co-defendant discloses protected information outside the group, it waives the privilege as to itself but not the entire group.⁴⁴

The joint defense privilege can also be waived by later litigation between parties to the agreement.⁴⁵ But, as some commentators have noted, this type of waiver is selective—although co-defendants who sue each other can use statements made in furtherance of the joint defense agreement against each other, a third party cannot obtain access to the communications.⁴⁶ To invoke this selective waiver, there must be actual litigation that ends the co-defendant relationship.⁴⁷ A mere change in one party's position does not constitute subsequent litigation.⁴⁸

⁴⁴ *Western Fuels*, 102 F.R.D. at 203 (“...[t]his limitation is necessary to assure joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally waive the privileges of all participants, either purposefully in an effort to exonerate himself, or inadvertently”); *Madison Management Group, Inc. v. Fogel*, 212 B.R. 894, 898 (N.D. Ill. 1997) (“Joint defense privilege would be stripped of its purpose and effectiveness if one party could unilaterally waive the privilege in favor of a third party, even if the original defendants had become adverse.”).

⁴⁵ *Simpson v. Motorists Mutual Ins. Co.*, 494 F.2d 850 (7th Cir. 1974).

⁴⁶ *Pasternak and Donoghue*, *supra* note 17, at 29.

⁴⁷ *State v. Cascone*, 487 A.2d 186 (Conn. 1985); *In re Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989).

⁴⁸ *People v. Abair*, 228 P.2d 336 (Cal. Ct. App. 1951) (turning state's witness does not waive the privilege); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21 (N.D. Ill. 1980) (failing to resolve whether filing a cross-action meets the adversary requirement).

V. Ethical Issues Associated with Joint Defense Agreements

Before making the decision to join a joint defense group, careful thought should be given to the ethical issues associated with participation in such groups.

A. Conflicts of Interest

Counsel must always be conscious that participation in a joint defense group may lead to conflicts of interest. One of the most common conflicts arises when one of the members leaves the joint defense group and the attorneys for the remaining members of the group want to cross-examine the defecting member with information learned through membership in the joint defense group. At least one court has held that when the interests of one member of the agreement become conflicted with other members, the lawyers for the other parties may not cross-examine the turncoat witness and continue to represent the co-defendants without violating ethical duties to the defecting witness.⁴⁹

In *Henke*, the government charged three executives at Cal Micro—Gupta, Desai, and Henke,—with conspiracy, false statements and securities crimes. They all participated in joint defense meetings and discussed confidential information. Before trial, Gupta accepted a plea agreement with the government and agreed to testify against the others.

Counsel for Desai and Henke moved to withdraw on the ground that under the joint defense privilege they owed a duty of confidentiality to Gupta that

⁴⁹ *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000).

prevented them from cross-examining Gupta on matters discussed at the joint defense meetings. Gupta threatened legal action against both attorneys if either revealed what was discussed during the joint defense meetings.

The District Court denied the motions to withdraw. At trial, the defense did not cross-examine Gupta and the jury convicted Desaigouadar and Henke. The matter was then appealed to the Ninth Circuit Court of Appeals, which reversed the decision of the District Court. The Ninth Circuit accepted that under the joint defense agreement counsel for Desaigouadar and Henke had an implied attorney-client relationship with Gupta. According to the court, counsel for Desaigouadar and Henke could not ethically defend them by impeaching Gupta with information obtained from Gupta during the joint defense meetings. In the court's opinion, this created a disqualifying conflict of interest that should have led to their withdrawal as counsel for the convicted defendants.

Not all courts have followed the Ninth Circuit's lead. In *United States v. Almeida*,⁵⁰ the Eleventh Circuit Court of Appeals approved the cross-examination of a defecting co-defendant with information obtained as part of a joint defense effort. In *Almeida*, the government charged two men, Fainberg and Almeida, with conspiracy to traffic in narcotics. Fainberg and Almeida, who retained separate counsel, entered into an oral defense agreement and at more than 100 meetings they and their lawyers shared countless volumes of information protected by the attorney-client privilege and the work product doctrine. Shortly before trial Fainberg agreed to plead guilty and testify against Almeida.

The government argued at trial that because of the joint defense agreement Almeida's counsel had a "classic divided loyalty problem." According to the government, Almeida's counsel would violate the attorney-client privilege he had with Fainberg if, while defending Almeida, he cross-examined Fainberg with confidential information obtained from Fainberg during the joint defense meetings. The district court agreed, and barred not only the use of exculpatory evidence obtained directly from Fainberg, but also the derivative use of any information from Fainberg.

The Eleventh Circuit reversed, holding that Fainberg waived his attorney-client privilege when he decided to cooperate with the government. According to the court, "...when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence."⁵¹ A similar result was reached in *United States v. Anderson*,⁵² where the court held that the defense attorneys' participation in a joint defense agreement did not present a conflict of interest and the cooperating defendant "knowingly and intelligently waived his right to counsel with undivided loyalties" and permitted his attorneys who received information from others in the course of a joint defense effort to continue to represent him.⁵³

⁵¹ *Id.* at 1326.

⁵² 790 F. Supp. 231 (W.D. Wash. 1992).

⁵³ *Id.* at 232.

⁵⁰ 341 F.3d 1318 (11th Cir. 2003).

Conflicts may also arise when another lawyer in a firm wants to sue a member of the joint defense group or when a lawyer leaves a firm that represents a member of a joint defense group and joins another firm that has brought suit or wants to bring suit against a member of the joint defense group. Both of these conflicts have been addressed in the case law and a recent opinion from the District of Columbia Bar Legal Ethics Committee.

In District of Columbia Bar Legal Ethics Committee Opinion 349,⁵⁴ the Committee addressed conflict of interest issues that arise when a lawyer in a firm enters into a joint defense agreement on behalf of a client and, subsequent to that representation, is asked to bring suit against another member of the joint defense group. For purposes of the analysis, the Committee assumed that the lawyer had received confidential information from non-client members of the group and that the lawyer and his firm were no longer involved in the joint representation.

The Committee first addressed whether the conflict rules even apply to non-client parties to a joint defense agreement and, if so, whether any conflict created under the rules can be imputed to the law firm. According to Rule 1.7(b)(4) of the D.C. Rules of Professional Conduct, a lawyer is prohibited from representing a client when the lawyer's judgment may be adversely affected by the lawyer's responsibility to a third party. Based on this rule, the Committee offered the opinion that a lawyer's contractual or fiduciary obligations to a non-client member of a joint defense group could give rise to a conflict with a client in a subsequent matter.

⁵⁴ Sept. 2009.

In addressing the issue of imputation, the Committee recognized that Rule 1.10 states that conflicts under Rule 1.7 will only be imputed in certain circumstances: if the lawyer's third party interest under Rule 1.7(b)(4) presents a significant risk of adversely affecting the representation of a client by other lawyers in the firm, then those other lawyers cannot engage in the representation. The Committee addressed this imputation rule in two different contexts: (1) where the lawyer has switched firms and (2) where the lawyer has remained at the same firm.

As to the first situation, the Committee offered the opinion that the new firm could represent a client against a joint defense member by timely and effectively screening the lawyer, thus effectively eliminating any appreciable risk that there could be an adverse effect on the representation. As to the second situation, the Committee concluded that the firm could not represent a client against a joint defense member unless the firm and its other lawyers were not bound by the joint defense agreement and the other lawyers in the firm were not exposed to any confidential information related to the joint defense agreement.⁵⁵

In *National Medical Enterprises, Inc. v. Godbey*,⁵⁶ the plaintiff, NME, retained Ed Tomko to represent a regional administrator and a director of the company in connection with various criminal investigations and civil lawsuits. Tomko received confidential information from the administrator and the director, as well as from

⁵⁵ *Joint Defense Agreements Give Rise to Unique Conflicts and Imputation Issues*, January 29, 2010 available at <http://www.hinshawlaw.com/joint-defense-agreements-give-rise-to-unique-conflicts-and-imputation-issues-01-28-2010/>.

⁵⁶ 924 S.W.2d 123 (Tex. 1996).

NME, pursuant to a joint defense agreement. The joint defense agreement applied to NME, its employees and former employees, counsel for NME and all employees and former employees of NME's counsel. Under the terms of the agreement, each party recognized that the joint defense privilege applied and each party was prohibited from disclosing any information that was subject to the privilege to third parties—absent the consent of the other parties to the agreement. The joint defense agreement further provided that each party subject to the agreement was represented only by his own attorney and that although the other attorneys in the group had a duty to preserve privileged information, the other attorneys did not represent other clients. The agreement also stated that each client member "...further understands and acknowledges that the attorney members representing other client members have the right, and may well have the obligation, to take actions against his or her own interest..."⁵⁷

After representing the regional administrator and director for approximately a year, Tomko withdrew as counsel. A year and a half later, other lawyers from Tomko's firm filed suit on behalf of over ninety plaintiffs against NME. The lawsuit did not name as defendants either the regional administrator or the director previously represented by Tomko. At the time the suit was filed, Tomko agreed that he would not disclose any information regarding the prior representation of NME or its employees. NME moved to disqualify the firm based on Tomko's possession of confidential information provided by NME pursuant to the joint defense

agreement. The trial court denied the motion to disqualify and NME sought mandamus relief from the Texas Supreme Court.

At the beginning of its opinion, the Texas Supreme Court stated that if Tomko had represented NME, as opposed to the employees, both he and his firm would be disqualified from bringing the action against NME. Although Tomko had not represented NME in the prior action, the court noted that the joint defense agreement imposed a duty on Tomko to preserve confidential information of all parties to the agreement, including those he did not represent. Since Tomko received confidential information from NME while under a duty to preserve the confidentiality of that material, the court concluded that Tomko would be unable to honor his obligations and sue NME at the same time.

The court then considered whether Tomko's inability to sue NME would preclude other members of his firm from suing the company. The court recognized that an "attorney's knowledge is imputed by law to every other attorney in the firm. There is, in effect, an irrebuttable presumption that an attorney...has access to the confidences of the clients and former clients of other attorneys in the firm."⁵⁸ The court concluded that an attorney's promise to preserve the confidences of a non-client under a joint defense agreement created the same presumption of shared confidences. Accordingly, the court precluded all members of Tomko's firm from bringing suit against NME.⁵⁹

Although some courts have precluded continued representation based on conflicts

⁵⁷ *Id.* at 125.

⁵⁸ *Id.* at 131.

⁵⁹ *Id.* at 132.

of interest, other courts have recognized that potential or actual conflicts of interest can be handled through a carefully drafted joint defense agreement that contains a prospective waiver of objections to conflicts of interest. In *Zador Corp. v. Kwan*,⁶⁰ before undertaking a defense of multiple parties in a contractual dispute, the attorney had one of the defendants execute a consent agreement regarding the joint defense. The agreement provided, in relevant part, as follows:

...[B]ecause we will be jointly retained by both you and the Co-defendants in this matter, in the event of a dispute between you and the Co-defendants, the attorney-client privilege generally will not protect communications that have taken place among all of you and attorneys in our firm. Moreover, pursuant to this "Joint Client" arrangement, anything you disclose to us may be disclosed to any of the other jointly represented clients.

In the event of a dispute or conflict between you and the Co-defendants, there is a risk that we may be disqualified from representing all of you absent written consent from all of you at that time. We anticipate that if such a conflict or dispute were to arise, we would continue to represent the [other Co-defendants]...Accordingly, we are now asking that you consent to our continued and future representation of the [Co-defendants] and agree not to assert any such conflict of interest or to seek to disqualify us from representing the [Co-defendants], notwithstanding any adversity that may develop.⁶¹

After a dispute developed between the defendants, counsel withdrew from representing the individual defendant and continued to represent the co-defendants. At the time of the withdrawal, the individual defendant orally reaffirmed the terms of the joint defense agreement. The dispute continued to escalate and the group defendants filed a cross-claim against the individual defendant. The individual defendant, in turn, filed a motion to disqualify his former attorney.

In considering whether the attorney should be disqualified, the court looked to the terms of the joint defense agreement. The court concluded that the agreement was sufficiently explicit to justify a finding that the individual defendant had consented to his former attorney's continued representation of the other defendants in the original action and on the cross-claim. Of particular import to the court was the agreement's express language whereby the single defendant agreed not to seek disqualification of his counsel "notwithstanding any adversity that may develop." The court found that by agreeing to this provision, the single defendant should have recognized that "any adversity" would naturally include litigation directly against the former client.⁶²

B. Disqualification

According to one set of legal commentators, "[c]ounsel negotiating and participating in joint defense agreements also must be aware that receipt of confidential information from a non-client may lead to the counsel's disqualification from subsequently bringing suit against that non-client in a matter substantially related to

⁶⁰ 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 1995).

⁶¹ *Id.* at 756 (emphasis omitted).

⁶² *Id.* at 763.

issues involved in the joint defense efforts.”⁶³ A review of some of the relevant case law reveals that disqualification is a very real possibility.

In *GTE North Inc. v. Apache Products Co.*,⁶⁴ the plaintiff sued several defendants in a CERCLA cost recovery action. One of the defendants was represented by counsel who had previously represented Chrysler Corporation when Chrysler was a member, with the plaintiff, of a joint remedial cost sharing group. All of the members of the group signed joint agreements, which the court found contained confidentiality provisions. The court further found that confidential information had been disseminated among all of the members, including Chrysler and its counsel. The court disqualified defense counsel and his law firm from representing the defendant, finding that the lawyer’s “receipt of such disclosures and participation in [joint] meetings obligated him to refrain from reappearing on the opposite side of the litigation...”⁶⁵

In *Essex Chemical Corp. v. Hartford Accident and Indemnity Co.*,⁶⁶ a magistrate judge issued an order disqualifying all of the law firm members of a joint defense group. The order was entered following discovery that one of the firms had previously represented the plaintiff on related matters. The magistrate judge ruled that an implied attorney-client relationship was created between all of the attorney members of the joint defense group and all of the clients and that this relationship created an irrebuttable presumption that each firm was privy to the plaintiff’s

confidential information. Luckily for the law firms, the decision of the magistrate judge was reversed by the District Court judge assigned to hear the case.⁶⁷

In *City of Kalamazoo v. Michigan Disposal Service Corp.*,⁶⁸ counsel represented General Motors Corporation in a CERCLA action brought against multiple defendants. A joint defense group was established at the beginning of the action and counsel for General Motors did the majority of the work on behalf of the joint defense group. In subsequent litigation in which GM and another member of the joint defense group found themselves on opposite sides of the fence, the other member was successful in disqualifying GM’s counsel from representing the company in the new matter. The court granted the motion to disqualify because it found that an imputed attorney-client relationship had been created as a result of mutual participation in the joint defense group.

Although several courts have been quick to recognize imputed knowledge and subsequent disqualification, others have been wary of jumping to the same conclusion. In *Rio Hondo Implement Co. v. Euresti*,⁶⁹ the Texas Court of Appeals held that a party who claims the joint defense privilege as a basis for disqualification of counsel must establish at an evidentiary hearing (1) that confidential information has been shared and (2) that the matter in which that information was shared is substantially related to the matter in which disqualification is sought. Since there was

⁶³ Wilson and Houlding, *supra*, note 17, at 453.

⁶⁴ 914 F. Supp. 1575 (N.D. Ill. 1996).

⁶⁵ *Id.* at 1581.

⁶⁶ 975 F. Supp. 650 (D.N.J. 1997).

⁶⁷ *Essex Chemical Corp. v. Hartford Accident and Indemnity Co.*, 993 F. Supp. 241 (D.N.J. 1998).

⁶⁸ 125 F. Supp.2d 219 (W.D. Mich. 2000).

⁶⁹ 903 S.W.2d 128 (Tex. App. 1995).

no such showing in the case, the request for disqualification was denied.

C. Fiduciary Relationships

Counsel must also be sensitive to the fact that some courts have held that joint defense agreements can create fiduciary relationships between attorneys and parties to the agreement who are not their clients. The *Godbey* court held that the obligation to preserve all confidences exchanged under a joint defense agreement transforms into a fiduciary relationship between the participating attorneys and their

non-client co-defendants.⁷⁰ As such, use of any information obtained pursuant to a joint defense agreement to the detriment of a non-client co-defendant would result in a breach of that fiduciary duty.⁷¹

A joint defense agreement can be a powerful weapon in the defense arsenal. However, this weapon, like every weapon, must be handled with care. Before entering into a joint defense agreement, counsel must understand the legal issues, know the law, give careful thought to the advantages and disadvantages of such agreements, and spend the time necessary to carefully draft the right agreement.

⁷⁰ *Godbey*, 924 S.W.2d at 131.

⁷¹ See, e.g., *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977); *Analytica Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983).