Common Interest Agreements
ABA Tax Section
Court Procedure & Practice Committee
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The Common Interest Doctrine

• A collaborative effort among counsel for separate clients presents a risk of third-party disclosure of privileged communications or protected documents. Such disclosure might constitute a waiver or relinquishment of any applicable privilege or protection.

• Under the common interest doctrine, parties involved in a joint effort related to a common legal interest are permitted to share confidential information without impacting the privileged or protected nature of such information.

• The doctrine is best viewed as an exception to the general rule that no privilege attaches to communications or information disclosed to a third party.

The Elements

• A Common Interest Arrangement allows:
  • clients with a common interest
  • in a litigated or nonlitigated matter
  • represented by separate lawyers
  • who agree to exchange information about the matter
  • in a communication that would be privileged if made between the client and his attorney
  • to remain privileged as against third parties.
  • (But, absent a clear agreement to the contrary, such communications do not remain privileged in a subsequent adverse proceeding between the parties.)
Clients With a Common Interest

A common interest can be legal, factual, or strategic.

The interests of separately represented clients need not be entirely congruent to be a common interest.

The fact that clients with common interests may also have sharply conflicting interests does not mean that communications on matters of common interest are not privileged.

All of the parties to a common interest agreement must share the common interest.

The known presence of a stranger negates the privilege for communications made in the stranger’s presence.

In a Litigated or Non-litigated Matter

Common interest agreements originated with joint defense (allowing defendants to coordinate their cases).

The parties were jointly indicted for a conspiracy. They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication. They had the same defense to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all.

In a Litigated or Non-litigated Matter (cont.)

- No requirement of actual or imminent litigation.
- Courts have progressively expanded the privilege.
- It now applies to:
  - Civil or criminal co-defendants with the same or different attorneys;
  - Two or more respondents in a grand jury investigation;
  - Co-plaintiffs in a civil suit;
  - Prospective clients in a joint consultation;
  - Potential parties to a merger;
  - Non-parties to litigation.

Representative Situations Using a Common Interest Agreement

- Multiple taxpayers involved in a similar transaction.
- Industry specific taxpayers facing a coordinated issue.
- Communications between the taxpayer and counsel representing an accounting firm in a separate case involving similar transactions to those at issue in the taxpayer’s matter.
- Communications between general business counsel for the taxpayer and the taxpayer’s counsel in litigation.
- Separate representation of husband and wife.
- Communications between law firm and accounting firm regarding the legality of a proposed financial course of action they are considering recommending to their common clients.
- TEFRA partnership – separate representation of TMP and LPs
- Potential targets or co-defendants in criminal matter.
Represented By Separate Lawyers

- Common interest agreements do not create a new privilege.
  - Such agreements merely extend the attorney-client privilege to communications made to someone other than the attorney and client.
  - A person who is neither a lawyer nor represented by a lawyer cannot participate in a common interest agreement.
  - Client to client communications are not privileged under a common interest arrangement unless made for the purpose of communicating with a privileged person.

Who Agree to Exchange Information

- Exchanging communications may occur under an express agreement, but formality is not required.
- The communications must relate to the common interest.
- By the mere fact of entering into common interest agreement, separately represented clients do not impliedly agree to exchange ALL relevant information concerning the matter of common interest.
  - Merely having common interests does not provide a basis to force disclosure in the absence of an agreement to do so.
  - Confidential communications disclosed to only some members of the agreement remain privileged against other members as well as against third parties.
Only Applies to Privileged Communications

• A common interest agreement does not create a new kind of privilege.
  • It only extends privilege to a wider circle.
    • The exchanged communication must itself be privileged, or
    • The exchanged communication would have been privileged if between a client and the client's lawyer.
  • A common interest agreement only applies to protect communications that otherwise fall under some existing privilege or protection. If no privilege or protection shields a document from discovery, then a common interest agreement provides no additional protection.

To Remain Privileged Against Third Parties

• Any party to a common interest agreement can invoke the privilege against third parties, unless privilege has been waived by the client who made the communication.
Subsequent Adverse Proceedings

- Disclosing privileged communications to members of common interest agreement waives the privilege between members in subsequent adverse proceedings, unless they have explicitly agreed to the contrary.
  - Applies only to communications actually exchanged.
    - Exchanging some privileged communications does not waive privilege with respect to all communications relevant to the matter.
  - It is uncertain whether a court would enforce a provision in a common interest agreement where the parties sought to retain the privilege against each other in subsequent adverse proceedings.

Waiver

- A member of a common interest agreement can waive privilege only with respect to that person’s own communications.
  - A member is not authorized to waive privilege for another member’s communication.
  - If a document reflects communications made by multiple members, all members must concur to waive (or objecting member can redact.)
  - Privilege may be waived where the parties cannot establish that they intended for the communication to remain confidential and that it was reasonably expected and understood to be confidential.
Interaction with Kovel Doctrine

- Under *Kovel*, when a client, a lawyer, and an accountant are present, the accountant’s presence will destroy the privilege if the accountant is not "necessary, or at least highly useful, for the effective consultation between the client and the lawyer." *Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

- Common interest protection does not extend to prevent waiver when an accountant, not within the *Kovel* doctrine, is made privy to the attorney-client communications. In such an instance, the accountant does not share an interest in receiving legal advice from the lawyer and cannot logically be said to have an interest in common with the represented party or parties.
  - *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002).

Potential Benefits

- Promotes inter-attorney exchanges, open discourse and cooperation between parties.
- Promotes sharing of knowledge and resources.
- Promotes cost sharing in that it may limit duplicative efforts by counsel (e.g., attorney research and investigation or third party expenses such as experts, investigators, accountants, consultants, etc.)
- Increases efficiency of the court system – limitation on repetitive and duplicative presentations to the court.
- Strategic advantage in coordinating defense – work together to assess the strength of the government’s case and prepare a strategy to attack/defend against it. Additionally, prevents inconsistent or contradicting defenses.
- Strategic advantage in presenting coordinated group for settlement purposes – more difficult for a party to achieve a piecemeal settlement when the adversarial parties are acting in concert.
Risks

- Failure to obtain “fully informed” consent prior to entering into a common interest agreement.
- Potential risk of attorney disqualification or mandatory withdrawal due to conflicts of interest.
  - Such conflicts may be imputed from the lawyer to their firm unless there is an adequate screening mechanism.
  - In criminal cases, government may raise conflict issues related to JDA in order to limit appellate concerns.
- Court imposed sanctions against one party to the agreement could create a risk to the other parties to the agreement.

Oral or Written Agreement

- Common interest agreements can range from simple oral agreements between the parties to lengthy formal written agreements.
- The burden is on the party asserting the common interest doctrine to demonstrate the existence of a common interest agreement.
- Benefits of a written agreement:
  - Evidences existence of common interest.
  - When the scope of the agreement is at issue – Written agreement clearly sets out specific terms.
  - Clearly identifies the duties of the parties upon withdrawal.
  - Specifically disclaims the creation of any attorney-client privilege relationship and limits conflict of interest concerns through waiver.
- However, a written agreement is likely subject to discovery.
Specific Provisions to Include

- Retroactivity – preserve privilege as it relates to communications between the parties prior to signing the agreement.
- Address withdrawal of parties – specific waiver to allow cross-examination and impeachment of a defecting common interest group member.
- Protect against future disclosure in future litigation (include future litigation involving other parties to the agreement?).
- Disclaim/waive any conflict issues or concerns or the creation of any attorney-client relationship (direct or implied) as a result of the agreement.
- Define what materials are subject to protection and how such materials can be used by the parties.

Specific Provisions to Include (cont.)

- Define the parties to the agreement
- Provide a procedure for sharing materials and information (e.g., a requirement that all materials be clearly marked as being subject to the agreement)
- Acknowledge that the agreement is not an agreement to violate the law (i.e., no agreement to obstruct or impede an IRS audit, criminal investigation, etc.)
- Outline the “common interest” of the parties (e.g., defending against a criminal investigation or indictment, addressing pending civil litigation, etc.)
- Outline how the parties can use the information shared (e.g., the parties are permitted to use the information at trial)
Creating Client Relationships

- Courts and commentators disagree as to whether an attorney-client relationship forms between an attorney and a pseudo-client (i.e., the non-client who is a party to a common interest agreement with the client)
  - There is consensus that an attorney owes some duty to a pseudo-client.
  - Joint representation does not create attorney-client relationship with pseudo-client, but contractual and fiduciary duties may exist.

Creating Client Relationships (cont.)

- Several courts have found that a joint defense agreement creates an express or implied direct attorney-client relationship between attorney and pseudo-client.
- No Court has yet considered whether any other type of common interest agreement would create a direct attorney-client relationship.
Creating Client Relationships (cont.)

- Direct vs. Implied Attorney-Client relationship
  - If an attorney performs the role of common counsel to a joint defense consortium, then a direct attorney-client relationship exists between the attorney and all clients under the agreement.
  - If an attorney receives confidential information from a pseudo-client, then there may be an implied attorney-client relationship between the attorney and that pseudo-client.
  - Whether direct or implied, attorneys owe duties as to a client, including confidentiality.
    - A pseudo-client is more than just another third party - contractual, fiduciary, and confidentiality duties may remain.

Creating Client Relationships (cont.)

- How does the assumption of ethical duties to pseudo-client(s) affect Attorney’s ethical duties to original client?
  - Informed consent of client before entering common interest agreement - does it require fully informing client of potential conflicts of interest and consequences thereof caused by attorney’s assumption of duties to pseudo-client?
  - After divergence of the client’s and the pseudo-client’s interests, the attorney remains obligated to preserve confidentiality of the pseudo-client.

• In Opinion 349, the D.C. Bar Legal Ethics Committee analyzed the issue of whether and to what extent the District of Columbia Rules of Professional Conduct apply to representations adverse to members of a common interest or joint defense group who were never clients of the lawyer or law firm. The D.C. Rules follow the format of the ABA Model Rules of Professional Conduct.

• The Committee recognized that a lawyer who participates in a common interest agreement “may acquire contractual and fiduciary obligations to the members of the joint defense group who were not the lawyer’s clients.” These obligations could possibly give rise to a personally disqualifying conflict to the extent that such obligations “materially limit the lawyer’s ability to prosecute or defend a substantially related matter adverse to a [common interest] group member.”

D.C. Bar Opinion 349 (cont.)

• The Committee did not analyze the conflicts created by common interest agreements under Rule 1.9 (dealing with duties to a former client) “[b]ecause a non-client member of a joint defense group is not a ‘client’ – and in many cases could not be a client under the applicable conflict rules....” As a result, the Committee determined that “Rule 1.9 does not preclude adversity to non-client joint defense group members.”

• The Committee also concluded that a lawyer who is party to a common interest agreement does not have any confidentiality obligations to the “non-client” members of the group under Rule 1.6 because Rule 1.6 only applies to “a confidence or secret of the lawyer’s client.”
D.C. Bar Opinion 349 (cont.)

- Rule 1.7(b)(4) prohibits a lawyer from representing a client when the attorney’s judgment may be adversely affected by duties to a third party (including contractual obligations to pseudo-client.)
- Rule 1.10(a)(1) provides that conflicts will only be imputed if the pseudo-client’s interests present a significant risk of adversely affecting the representation of a client by other lawyers in the firm.
  - If so, then the other lawyers in the firm will be barred as well.
  - Where the lawyer has switched firms, timely and effective screening of the lawyer could eliminate any appreciable risk of an adverse effect on the representation.
  - Where the lawyer is at the same firm, the firm itself may have been party to the common interest agreement, and other members of the firm may have come into contact with confidential information, making a retroactive screen difficult. Thus, the firm likely cannot represent a client against a pseudo-client unless these issues were absent.

Creating Client Relationships: Cases of Interest

- **United States v. Henke**, 222 F.3d 633 (9th Cir. 2000)
  - Before trial, party to a joint defense agreement accepted a plea agreement and promised to testify for the government. Attorney for one of the defendants moved for a mistrial and to withdraw because his duty of confidentiality under the JDA prevented him from cross-examining the individual on matters involving information the attorney learned as a result of the privileged pre-trial meetings.
  - The district court denied the motion to withdraw.
  - In a per curiam decision, the Ninth Circuit reversed. The panel found that the JDA created an “implied attorney-client relationship” between a co-defendant’s counsel and the other co-defendants that were parties to the agreement, and that this implied relationship can create a disqualifying conflict when information obtained pursuant to a joint defense agreement becomes a contested issue.
Creating Client Relationships: Cases of Interest (cont.)

  - The court ordered that a proposed JDA be submitted to the court for in camera review. Defense counsel submitted two proposed agreements to the court. The court then issued an opinion regarding required provisions for the parties' JDA and generally discussing JDAs, the joint defense privilege and related ethical concerns.
  - The court held that a joint defense agreement which purported to create “a general duty of loyalty to all participating defendants” was “unacceptable” and supported by “neither precedent nor sound policy.” Additionally, the court found that “[a] duty of loyalty between parties to a joint defense agreement would create a minefield of potential conflicts.”
  - Thus, “a joint defense agreement that imposes a duty of loyalty to all members of the joint defense agreement eliminates the utility of employing separate counsel for each defendant and effectively creates a situation in which all signing defendants are represented jointly by a team of all signing attorneys.”

  - In response to a multi-party personal injury claim, defense counsel shared their individual work product regarding the litigation consistent with a pretrial order permitting defense counsel to share information regarding their common interests without waiving attorney-client privilege and work product protections.
  - An attorney who had represented one of the defendants in the litigation became an associate of the law firm that represented the claimant. The defendants sought the disqualification of the claimant’s law firm in order to protect defense counsel’s work product.
  - Court held that the defendants had standing to seek the firm's disqualification to protect their work product. The court found that the associate was disqualified because he had a per se conflict of interest and that the firm was vicariously disqualified.
Criminal Tax Litigation: Issues and Concerns

• As one commentator has described, government will often hold the view that a joint defense agreement is nothing more than “judicially authorized obstruction of justice.”

• In a criminal case, the need for a written agreement is heightened.
  • Parties should make it clear that the agreement is not intended to impede any government investigation and it should set forth a procedure for addressing how the parties should respond to a request for information from the government.
  • Representations regarding the fact that no party to the agreement is cooperating with the government and provisions requiring withdraw if a party decides to cooperate.
  • A conflict waiver provision ensures that if any party to the agreement decides to cooperate, the cooperating party waives any right to prevent the remaining parties from using any information against that party.

Criminal Tax Litigation: Issues and Concerns (cont.)

• Crime-Fraud Exception
  • Because the joint defense privilege is merely an extension of the attorney-client privilege, the protection of the joint defense privilege is also subject to the crime-fraud exception.
  • Where the government believes that the parties to a JDA are acting in concert to obstruct justice (e.g., coercing parties to testify falsely, agreeing to provide false or misleading documents, etc.), the government may argue that the joint defense privilege is subject to the crime-fraud exception. Should the government be successful, the parties to the JDA could be compelled to reveal information and materials that were otherwise protected.
  • Legitimate tax planning vs. tax evasion
Criminal Tax Litigation:
Issues and Concerns (cont.)

• DOJ has modified its stance regarding JDAs over the years. However, DOJ still expresses concern over the negative impact that a JDA may have on a party’s ability to cooperate.
  • Holder Memorandum (1999), Thompson Memorandum (2003), and McNulty Memorandum (2006) – reinforced DOJ’s policy that a corporation’s entry into a JDA could be considered negatively against the company in evaluating the corporation’s “cooperation” with the government.
  • Filip Memorandum (2008) – provides 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.” However, the memorandum suggests that corporations could be “disabled…from providing…relevant facts to the government” due to the restrictions contained in a joint defense agreement.

Resources

• Restatement (3d) of the Law Governing Lawyers, §76
• Revised Uniform Rules of Evidence, Rule 502(b)(3)
• Proposed Federal Rules of Evidence, Rule 503(b)(3)
• The Law of Lawyering, 3d Ed. (Hazard & Hodes)