POINTS TO REMEMBER

Protecting Yourself and Your Client in a Joint Defense Arrangement*

By Rachel L. Partain†

Civil examinations and litigations and criminal cases often involve multiple, sometimes related, persons—each of whom might be represented by separate counsel. In such situations, those involved may benefit from joining together to advance their common interests or to provide for a joint defense. Ordinarily, the attorney–client privilege would not attach where a third party is present during a confidential communication between an attorney and his client, and the attorney–client privilege would be waived where formerly privileged communications are disclosed to a third party. *See, e.g., Genentech, Inc. v. United States International Trade Commission*, 122 F.3d 1409, 1415 (Fed. Cir. 1997) (citations omitted). However, as discussed further below, the common interest doctrine, also referred to as the joint defense doctrine, operates to extend the reach of the attorney–client privilege in the joint defense context.

This article highlights certain issues that should be considered by attorneys and their clients when deciding to participate in joint defense arrangements and also discusses how to formalize such arrangements.

Joint Defense Arrangements

The joint defense doctrine operates as an exception to the rule that the attorney–client privilege does not protect communications made to third parties. *See, e.g., In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 248–49 (4th Cir. 1990). In order to qualify for protection, confidential and otherwise privileged communications can be shared with joint defense participants who have a common legal interest where the communications are made in furtherance of the common legal interest. *See, e.g., United States v. BDO Seidman, LLP*, 492 F.3d 806, 815–16 (7th Cir. 2007) (citation omitted).

In addition to allowing participants to present a unified front, there are numerous benefits to forming a joint defense arrangement. The arrangements may reduce a client's expenses as participants typically share in the costs of common projects. Also, attorneys may find that participating in a joint defense group allows for an efficient use of discovery limitations, such as on the number of depositions or requests for admission, or an ability to specialize in a particular area of the joint defense. Further, joint defense arrangements can result in judicial efficiency as a result of combined court filings.

Informal or Formal Joint Defense Arrangement?

After deciding to participate in a joint defense agreement, the first issue to consider is whether to have an oral or written agreement. The answer generally depends on whether those involved trust one another. Oral agreements are often limited to situations in which the participants trust one another and the attorneys have a good working relationship. For example, an oral agreement may be appropriate in a situation in which a husband and wife retain separate counsel in connection with an investigation by the Service. Many practitioners, however, choose to use written agreements as a general rule. Formerly common interests can diverge at any point in the arrangement, particularly in the criminal context where one participant may decide to cooperate with the government. A written agreement allows for the parties to decide in advance the obligations of the participants upon withdrawal or upon the dissolution of the agreement. In fact, the joint defense agreement might require notice to the other participants as early as when a participant is in discussions with the government regarding cooperation. Further, a written agreement may help stave off a discovery demand for shared materials, given that the party asserting the joint defense privilege has the burden of proof. *See United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999).

Where a written joint defense agreement is used, it is necessary to determine which persons will be parties to the agreement. Should the agreement be signed only by the clients, only by the attorneys, or by both the clients and the attorneys? While it appears that nearly all practitioners have their clients sign the agreement, there does not appear to be a generally accepted practice with respect to whether the attorneys are also signatories. For the reasons discussed below, it is recommended that the agreement be between both the clients and the attorneys.

* This material was initially presented as a Court Procedure and Practice Committee panel discussion at the ABA Section of Taxation's Joint Fall CLE Meeting held in Denver, Colorado, on October 21, 2011. The author was the moderator and the panelists were Richard J. Sapinski (Sills Cummis & Gross, P.C.), Jeffrey A. Neiman (The Law Offices of Jeffrey A. Neiman), and Megan L. Brackney (Kostelanetz & Fink, LLP).

† Caplin & Drysdale, Chartered, New York, NY.

Ethical Implications of Joint Defense Arrangements

There are potential conflicts of which attorneys should be mindful when entering into a joint defense arrangement. Some courts have found that a joint defense arrangement can create an implied attorney–client relationship. *See, e.g., United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000). If such a relationship were found, attorneys would have ethical obligations to all participants. ABA Committee on Ethics and Professional Responsibility Formal Opinion 95-395 states that a joint defense agreement does not create an attorney–client relationship. However, an attorney that learns of confidential information from a non-client participant would have a fiduciary obligation to keep the information confidential. *See Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977). Further, as discussed in D.C. Bar Legal Ethics Committee Opinion 349, a joint defense agreement may create issues for other attorneys at the lawyer's firm unless certain precautions are taken in a timely manner.

Even a fiduciary confidentiality obligation may result in a potential conflict with respect to the joint defense matter and with respect to future matters. With respect to the current matter, under ABA Model Rule 1.7, a concurrent conflict of interest may exist where there is a significant risk that a lawyer's representation may be materially limited as a result of the lawyer's responsibilities to a third person. An attorney may be required to withdraw from the representation of his client if the attorney's ability to continue representation is limited by confidential information learned from a non-client participant. Thus, where the participants share confidences and a participant later withdraws, the attorneys may try to disqualify the attorney for the withdrawing participant, or the withdrawing attorney may try to disqualify the other attorneys based on the confidentiality obligation. With respect to future matters, an attorney may be disqualified from taking a matter adverse to a quasi-client in a subsequent, but substantially related, matter where the attorney learns confidential information from a quasi-client during the joint defense arrangement. *See Wilson P. Abraham Constr. Corp.*, 559 F.2d at 253.

Joint defense agreements containing certain key provisions that are signed by all attorneys and clients may provide some protection from the ethical concerns discussed above, although such provisions are not necessarily determinative. First, the agreement should confirm that the attorneys explained the agreement to their clients and fully advised the clients of the risks and benefits of entering into the joint defense agreement. Second, the attorneys can disclaim the creation of any attorney–client relationship in the agreement, and the attorneys can have each participant specifically confirm that he understands that no attorney–client relationship is being formed with any other attorney. In addition to the agreement itself, attorneys may want to exclude clients from joint defense meetings, as is typically the case, in order to serve as an additional protection against the finding of the creation of an implied attorney–client relationship.

Third, the agreement should address the continued representation of the remaining participants should another participant withdraw. Attorneys should consider whether to include a general provision wherein clients waive, with respect to the present or any future matters, any conflicts of any attorney who receives confidential information during the joint defense arrangement. A specific provision waiving any confidentiality obligations to a withdrawing participant is sometimes included. For example, the agreement could provide that should a participant become a cooperating witness, an attorney can cross examine or impeach the witness based on information that the witness disclosed during the joint defense. *See United States v. Stepney*, 246 F. Supp. 2d 1069, 1085–86 (N.D. Cal. 2003). Finally, some thought should be given as to whether to include specific provisions addressing conflict issues relating to the law firms of the participating attorneys.

As a final practice point, attorneys should sign the joint defense agreement individually. D.C. Bar Legal Ethics Committee Opinion 349 cautions that a law firm could potentially have obligations to non-client participants under the terms of a joint defense agreement.

Participant Concerns

Clients also may have concerns that should be addressed in the joint defense agreement, particularly relating to withdrawal. Advance planning may alleviate some of the strife that may result from the withdrawal of a member. For example, written joint defense agreements typically include a provision requiring the return of any documents or materials shared between the participants. Participants should also consider the impact that a withdrawing participant might have on any discovery methods chosen to assist with the joint defense. For example, if one participant pushes the adoption of an expensive or proprietary software program or electronic database, what happens should that participant withdraw?

Further, the parties should contemplate whether a participant can be forced to leave the joint defense group if, for example, material terms of the agreement are breached. As a significant benefit of participating in a joint defense agreement is the potential to reduce costs, the parties may want to have a process available where a member is free riding off of the group.

Conclusion

Joint defense arrangements are common given the numerous advantages of coordinating a unified strategy, but they do pose their own risks. Attorneys and their clients should reflect, prior to entering into a joint defense group, on the possible pitfalls that might occur with respect to the particular engagement and try to address such contingencies in a written agreement signed by all of the parties. ■