Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relationships

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Antitrust lawyers involved in merger reviews or multi-party litigation frequently enter into joint defense agreements (JDAs).[1] While such agreements are important in preserving legal privileges and facilitating coordination among parties with similar interests, they can create potentially significant conflict of interest issues.

It is common for companies under investigation for possible cartel activities to enter into a JDA to facilitate fact gathering and development of a coordinated strategy. Similar interests might motivate formation of common interest groups in merger reviews or civil antitrust lawsuits. In all of these settings, there may be reasons for one or more parties subsequently to withdraw from a JDA (e.g., an individual litigation settlement, or a leniency application or plea agreement in the criminal context) and, in so doing, become potentially adverse to the remaining members of the group.

A recently issued D.C. Bar ethics opinion (Opinion 349) offers a useful analysis of the ethical and fiduciary issues presented by JDAs and provides a strong reminder to lawyers of the need to consider these issues before they enter into such relationships.[2] After briefly reviewing the basic elements of JDAs and the guidance provided by Opinion 349, this article discusses the potential conflicts and ethics issues posed by JDAs and offers some practical suggestions on how to minimize these risks in antitrust representations.

Basic Elements of Joint Defense Agreements

A JDA is a means for a client and its lawyer to share privileged information with third parties sharing a "common interest" without waiving otherwise applicable legal privileges by this disclosure. It is based on the joint defense privilege, which

> permits a client to disclose information to her attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege and is intended to preclude joint parties and their attorneys from disclosing confidential information learned as a consequence of the joint defense without permission.[3]

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[1] While the term "joint defense agreement" is commonly used, the existence of formal litigation is not required to protect the sharing of privileged information. As a result, other terms have been applied to this relationship, such as the "allied lawyer doctrine," "common interest doctrine," or "pooled information doctrine." *See* Lugosch v. Congel, 219 F.R.D. 220, 236 (N.D.N.Y. 2003). For convenience, this article primarily will use the term JDA.

[2] D.C. Bar Legal Ethics Comm., Op. 349, Conflicts of Interest for Lawyers Associated with Screened Lawyers Who Participated in a Joint Defense Group (Sept. 2009) (Opinion 349), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion349.cfm.

[3] United States v. Hsia, 81 F. Supp. 2d 7, 16 (D.D.C. 2000) (citations omitted).

Although the joint defense privilege is accepted by most courts, there are differences in the type and degree of common interest required before the privilege is applied.[4] At a minimum, a party seeking to establish the privilege generally must show by a preponderance of the evidence that the shared communications were: (1) intended to be kept confidential,[5] (2) made at a time the parties shared a common legal interest,[6] and (3) exchanged in pursuit of that joint legal interest.[7]

The specific obligations on participants depend largely on the precise terms of the JDA, which can range from very simple oral undertakings to detailed written agreements.[8] Most JDAs operate smoothly to accomplish their intended objectives and do not raise conflicts or ethics issues. However, it is not uncommon to find instances when a party will withdraw from a JDA—for example, an antitrust defendant agrees to a settlement and/or enters into a cooperation agreement with plaintiffs. In such cases, the lawyer for the former joint defense group participant subsequently may find himself adverse to other members of the joint defense group on behalf of his original or a new client.[9]

[A]ny use of confidential information of other parties obtained through the joint defense relationship may be challenged or asserted as a basis for lawyer disqualification.

Take, for example, a cartel investigation that subsequently proceeds to class action damages litigation. Defendants formed a joint defense group that ultimately dissolved because of multiple leniency applications and individual settlements. In such circumstances, one party's subsequent use of information obtained through the joint defense relationship against former joint defense group members may be problematic.

The defendants' lawyers may face similar issues. As recognized by the D.C. Bar ethics committee in Opinion 349, post-withdrawal, a lawyer may be limited in his ability to:

- Cross-examine at trial a co-defendant who later decided to cooperate with the government and testify on its behalf;
- Put on a defense that conflicted with the defenses of the other defendants participating in a JDA; or
- Attempt to shift blame to other defendants or introduce any evidence which undercuts their defenses.

In all of these cases, any use of confidential information of other parties obtained through the joint defense relationship may be challenged or asserted as a basis for lawyer disqualification.

Moreover, it is not simply the individual attorney personally involved in the joint defense representation who confronts these issues. Applying the concept of imputed disqualification,[10] the

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[4] While the Restatement finds that a common interest "may be either legal, factual, or strategic in character," RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 76 cmt (2000), most courts limit its application to common legal interests. *See* THOMAS E. SPAHN, THE ANTITRUST-CLIENT PRIVILEGE: A PRACTITIONERS GUIDE 252 (2007).

[5] *See, e.g.*, United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989) ("To qualify for the privilege, the communication must have been made in confidence.").

[6] *See, e.g.*, United States v. United Techs. Corp., 979 F. Supp. 108, 111 (D. Conn. 1997) (parties asserting the joint defense privilege must share "a common legal interest about a legal matter" but "it is . . . unnecessary that there be actual litigation in progress") (citing United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989)).

[7] *See, e.g.*, SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn. 1976) (communications must be "directed at advancing the joint interest vis-à-vis the rest of the world").

[8] There is no requirement that joint defense agreement be in writing. *See, e.g.*, Continental Oil v. United States, 330 F.2d 347, 350 (9th Cir. 1964).

[9] *See, e.g.*, Amy Foot, *Joint Defense Agreements in Criminal Prosecution: Tactical and Ethical Implications*, 12 GEO. J. LEGAL ETHICS 377 (1999).

[10] MODEL RULES OF PROF'L CONDUCT R. 1.10 (Imputation of Conflicts of Interest: General Rule), *available at* http://www.abanet.org/cpr/mrpc/rule_1_10.html.

conflicts and other ethical restrictions of a single attorney can be imputed to the other attorneys "associated in a firm." Indeed, given the increasing lateral movement of lawyers among firms, issues arising from joint defense representations may confront an entirely new law firm that had no involvement in the original joint defense. In the worst possible outcome, a prior joint defense relationship may lead to disqualification of the lateral attorney's new law firm. Understanding the reasons for, and preventing, such outcomes requires a deeper consideration of the ethical issues presented by participating in JDAs.

Does the Sharing of Confidential Information in Joint Defense Agreements Create an Attorney-Client Relationship?

Because a primary goal of a JDA is to facilitate the sharing of otherwise privileged information without loss of the privilege, lawyers who participate in JDAs necessarily are exposed to confidences of the other, non-client members of the joint defense group. Does the receipt of such confidences create an implied or actual attorney-client relationship or otherwise trigger ethical obligations to protect or to not misuse the information, such as the confidentiality obligations of ABA Model Rule 1.6.[11] If such obligations are found, do they apply just to the time period in which a lawyer participates in a joint defense group? Or, like former client confidences,[12] do they continue to bind the attorney even after the joint defense relationship is terminated? The answers to these questions are important because access to confidential information can form the basis of attorney disqualification motions. Various courts that have found confidentiality obligations in joint defense relationships have utilized general conflict of interest principles to disqualify lawyers from representations adverse to participants in a joint defense group following their withdrawal.[13]

One basis for disqualification is that the JDA established an implied attorney-client relationship between the lawyers and the individual clients participating in the JDA.[14] Once an attorney-client relationship is found, some courts have found it easy to disqualify a participating lawyer who subsequently became adverse to one or more members of the joint defense group:

> [A]n attorney should also not be allowed to proceed against a co-defendant of a former client [if] the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and [if] confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.[15]

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[11] ABA Model Rule 1.6 provides in part that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Model Rules of Prof'l Conduct R. 1.6 (Confidentiality of Information), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html.

[12] Model Rules of Prof'l Conduct R. 1.9(c) ("A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html.

[13] *See, e.g.*, All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., 2009-1 Trade Cas. (CCH) ¶ 76,465 (N.D. Cal. 2008), *order clarified by* 2009-1 Trade Cas. (CCH) ¶ 76,501 (N.D. Cal. 2009).

[14] *See, e.g.*, United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000) ("A joint defense agreement establishes an implied attorney-client relationship with the co-defendant").

[15] Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977).

On the other hand, other courts[16] and the American Bar Association[17] have not found that joint defense participation creates a client relationship. The ABA in its analysis in Opinion 95-395, a formal ethics opinion on joint defense relationships, noted that information received through the joint defense relationship rather would be "information relating to representation of a client," which the lawyer would have an obligation to maintain in confidence under Rule 1.6(a), even though the information came not from the lawyer's client "but from another member of the consortium that was not represented by [l]awyer."[18] As a result, the consent of the original client to use the information may be required.[19] The ABA concluded that any obligations that the lawyer may have to other members of the joint defense group derive from fiduciary, not ethical, obligations.[20]

The D.C. Bar through its ethics committee in Opinion 349 also expressly rejected the argument that the sharing of confidences under a joint defense agreement gives rise to attorney-client relationship. Noting that a non-client member of a joint defense group often could not become a client under the applicable conflict rules,[21] the committee concluded that a non-client member of a joint defense group is not a client and thus the former client conflicts rule does not apply.

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The potential implications of a contrary finding are enormous—almost certain disqualification due to former client conflicts. Lawyers frequently make it a practice to include specific language in their JDAs specifically disclaiming any attorney-client relationship with the clients of other JDA participants. While this helps in withdrawal situations in avoiding the former client issues under ABA Model Rule 1.9, it does not completely resolve the possible conflict issues that might be found based on other obligations (i.e., as fiduciary obligations). Nor does it address the extent to which an attorney's individual disqualification is imputed to other lawyers in his firm. These are the issues that the D.C. Bar tackles in Opinion 349, the most recent (and certainly the most comprehensive) treatment of the conflict and disqualification issues arising out of JDAs.

Disqualification Issues: Screened Lawyer Changed Law Firms

In Opinion 349, the D.C. Bar ethics committee addressed two scenarios relating to joint defense groups that present familiar issues for antitrust lawyers. The first assumes that lawyer A represented an individual employee in a criminal investigation focused on that individual's employer (e.g., international cartel investigation). Attorney A executed a JDA with the other subjects of the investigation, including his client's employer, who all had a common interest in defeating the government charges. Under the JDA, Lawyer A received confidential information from the employer and participated in meetings with employer's counsel to discuss joint strategy and other work

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16 *See* United States v. Almeida, 341 F.3d 1318, 1326 (11th Cir. 2003) ("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").

17 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-395, Obligations of a Lawyer Who Formerly Represented a Client in Connection with a Joint Defense Consortium (1995).

18 *Id.* at 3 (emphasis added).

19 *Id.*

20 *Id.* at 5. The ABA found that this fiduciary obligation might arise from the law of agency (the lawyer having been a sub-agent of the client who in turn was the agent of the co-defendant with whom confidential information is shared), rather than from the law governing lawyers. *Id.* at 5 n.3 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 213 comment g(ii) (Preliminary Draft No. 11, 1995)).

21 An antitrust example is when a cartel investigation joint defense group includes a corporate employer and individual employees who are represented by separate counsel because of the potential direct adversity with their employer. *See* Kathryn M. Fenton & Ryan C. Thomas, "*The Rule of Professional Conduct Are Not Aspirational": Joint Representation of Corporations and Their Employees*, ANTITRUST SOURCE, June 2009, http://www.abanet.org/antitrust/at-source/09/06/Jun09-Fenton6-29f.pdf.

product. Lawyer A ultimately was successful in resolving his individual client's liability with the government, and so terminated the representation of the individual employee.

At this point, Lawyer A left his original law firm and joined a new law firm, which subsequently was approached by Client X, who wished to sue the employer of Lawyer A's client for treble damages arising out of the criminal price-fixing cartel. Lawyer A's new firm agreed to do so, and proposed to screen Lawyer A, the only lawyer at the firm who participated in the JDA and was exposed to confidential information of the other joint defense group participants. Even with the screen, would this representation violate Rules 1.6, 1.9, and 1.10, protecting confidential information and former client confidences and imputing an individual lawyer's conflict to all other lawyers in his firm?

The D.C. Bar ethics committee started its analysis by noting that the D.C. Rules of Professional Responsibility do not specifically address the subject of JDAs. It determined that the closest relevant provision—D.C. Rule 1.9 dealing with former client conflicts—was not directly applicable because a non-client member of a joint defense group is not a "client." Thus, neither the participating lawyer nor his new law firm is limited by former client conflict principles.[22]

The D.C. Bar ethics committee also rejected the confidentiality obligations of D.C. Rule 1.6, because it found that this rule applies to "a confidence or secret of the lawyer's client." Again, because the JDA did not make the parties to the joint defense agreement "clients" of the participating lawyers, Rule 1.6 did not apply. However, the committee noted that non-client members of a joint defense group can claim the protections due third parties to whom a lawyer may owe legal or fiduciary obligations. Such obligations, including the contractual commitments contained in JDAs, may trigger the conflict of interest provisions of D.C. Rule 1.7 (b)(4), which recognizes the potential for conflict when:

> The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

Thus, if a lawyer has undertaken fiduciary obligations by entering into the JDA, that lawyer may be personally disqualified from a subsequent representation adverse to a joint defense group member in a substantially related matter unless the lawyer is released from his obligation.

In the moving lawyer situation, the natural next question is whether this Rule 1.7(b)(4) conflict is imputed to the other lawyers in the new law firm. Under D.C.'s version of the imputation rules, Rule 1.7(b)(4) conflicts are not automatically imputed to other lawyers in the firm. Such imputation would arise only where the individual lawyer's personal interest "present[s] a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm."[23] The D.C. Bar ethics committee therefore concluded that a joint defense obligation to a non-client generally will be treated solely as an individual lawyer's obligation and not imputed to other lawyers in the new firm. In addition, according to the opinion, "[i]n most circumstances, deployment of a timely and effective screen will eliminate the risk that an individual lawyer's obligations under a joint defense agreement will adversely affect the client's representation by other lawyers in the firm."[24]

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[22] As the D.C. Bar committee recognized, "In the absence of a prohibited 'former client' conflict under Rule 1.9, there is nothing to impute to other lawyers at the same firm under Rule 1.10(a)." D.C. Bar Ethics Comm., Opinion 349, *supra* note 2.

[23] D.C. Rule 1.10(a)(1).

[24] D.C. Bar Ethics Comm., Opinion 349, *supra* note 2.

Disqualification Issues: Screened Lawyer Has Stayed at Same Law Firm

The D.C. Bar ethics committee used the same background facts to consider the ethical implications when Lawyer A did not change law firms. In this case, because the joint defense agreement required Lawyer A to keep confidential all information as well as work product received through the joint defense group, the firm proposed to screen Lawyer A and all the lawyers who represented the individual employee from any involvement in the lawsuit to be filed on behalf of Client X. Assuming an effective screen could be established, does this permit the original law firm to represent Client X against the employer of its former client without violating Rules 1.6, 1.9, and 1.10?

The individual lawyer may have obligations under Rule 1.7(b)(4) and these obligations may be imputed to other lawyers in the firm only if the JDA obligations present a "significant risk" of adversely affecting the representation of the firm's client.

The Rule 1.9 analysis remains the same as discussed above: because the employer never was Lawyer A's client, there was no former client issue under Rule 1.9, and hence no conflict to impute to the other lawyers in the firm under Rule 1.10. The individual lawyer may have obligations under Rule 1.7(b)(4) and these obligations may be imputed to other lawyers in the firm only if the JDA obligations present a "significant risk" of adversely affecting the representation of the firm's client.

In this "original firm" scenario, however, there are two additional issues that may affect the conflicts analysis: (1) the possibility that the firm itself is bound by the JDA (especially if the contractual undertaking was signed in the name of the firm); and (2) the practical difficulty of establishing retroactively a screen when multiple lawyers in the firm may have been exposed to confidences of the joint defense group during the period before the adverse representation commenced.

These considerations may make it more difficult for the original firm to avoid the imputed disqualification issues, and more likely to lead to a "significant risk" that joint defense obligations will impair the firm's ongoing representation of its proposed new client. As a result, the D.C. Bar ethics committee concluded:

> [I]n this scenario, the law firm likely would be precluded from undertaking the representation unless the law firm could conclude: (i) it and its other lawyers are not bound by the joint defense agreement; and (ii) none of the other lawyers had been exposed to any confidential information relating to the joint defense agreement.

The committee in Opinion 349 suggested two measures to minimize these potential conflicts issues. First, as soon as the joint defense agreement was executed, screens should be established within the firm to ensure that only Lawyer A and any other firm lawyers actually participating in the representation of the individual employee had access to confidential joint defense information. Second, assuming such screens would be created, the joint defense agreement should include language specifically acknowledging that nothing precluded the other lawyers in the firm "from undertaking litigation and other matters adverse to non-client members of the joint defense group, including matters that might be deemed to be substantially related to the matter that is the subject of the joint defense agreement."[25]

Practical Advice

Like a number of other ethics committees,[26] the D.C. Bar ethics committee encourages lawyers to anticipate and address in advance potential conflict issues that might arise upon withdrawal from the joint defense group. Practical measures that might minimize the risks of conflicts of interest and subsequent disqualification as a result of participation in JDAs include:

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[25] The opinion notes the practical difficulty that may be encountered in getting participants in the joint defense group to sign off on such undertakings. *Id.*

[26] *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390, Conflicts of Interest in the Corporate Family Context (Jan. 25, 1995) (urging use of initial engagement letter to identify clients and non-clients in corporate representation).

1. Always include language in the JDA that disclaims the creation of an attorney-client relationship and waives any right to file motions to disqualify in an action involving a withdrawn attorney and non-client member of the group. While not controlling in all circumstances, such disclaimers provide useful evidence of the contemporaneous intent of the parties and can be used to refute claims of an implied attorney-client relationship with a non-client member.
2. Include in a JDA specific waiver language. Among specific waivers that might be considered are those that address: (a) cross-examination and possible impeachment of a defecting joint defense group member; (b) lateral lawyers/new law firms and reject any imputed disqualification of a new law firm; and (c) expressly permit other lawyers in the participating attorney's law firm to represent clients in matters adverse to other joint defense members (even including matters substantially related to the joint defense matter).
3. Have individual attorneys sign the JDA rather than signing it on behalf of, or in the name of, the law firm. As Opinion 349 recognized, a JDA signed on behalf of the firm may give rise to the argument that the firm has undertaken fiduciary obligations to the other members of the joint defense group. This may present conflict or disqualification issues for the firm subsequently seeking to represent a new client against a non-client member of the group, even in circumstances in which all of the attorneys who participated in the joint defense activities have left the firm.
4. Consider limiting the number of attorneys who are exposed to confidential information from other members of the joint defense group; possibly undertake formal screening procedures like those suggested in Opinion 349 to limit access to the information received from other joint defense members. Both these steps may make it easier to demonstrate that any confidential information derived from the joint defense group was not widely disseminated throughout the firm and thus may assist in defending disqualification motions based on a later representation adverse to a former non-client member.

Conclusion

Joint defense agreements will continue to be used in a variety of antitrust representations. To ensure that they remain an effective tool on behalf of clients, it is important for attorneys to understand the possible risks associated with their use and to take prudent steps to avoid conflict of interest and disqualification issues. ●