

**Ethical Issues in Representing Clients in a
Multi-Defendant Case**

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ETHICAL CONSIDERATIONS AND JOINT DEFENSE AGREEMENTS

I. What is the “joint defense” doctrine?

“The ‘common interest’ or ‘joint defense’ doctrine ‘generally allows a defendant to assert the attorney-client privilege to protect his statements made in confidence . . . to an attorney for a co-defendant for a common purpose related to the defense of both.’” United States v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997). “The same general rule . . . protects ‘communications by a client to his own lawyer . . . when the lawyer subsequently shares them with co-defendants for purposes of a common defense.’” (citations omitted).” Id.

A. First recognized in the United States:

Chahoon v. Commonwealth, 1871 WL 4931 (Va. 1871).

“The parties were jointly indicted for a conspiracy to commit a particular crime, and severally indicted for forging and uttering the same paper. . . . They had the same defence 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, though, for purposes of convenience, he was employed and paid by his respective client.”

“They had a right, all the accused and their counsel, to consult together about the case and the defence, and it follows as a necessary consequence, that all the information, derived by any of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them. Otherwise what would such right of consultation be worth? Chahoon, 1871 WL 4931, *12.

B. Adopted by federal courts:

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

“The privilege asserted here is a valuable and important right for the protection of any client at any stage of his dealings with counsel. It is a vital and important right to the client’s right to representation by counsel.”

Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965):

“[W]here two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.”

II. When can information be used?

- A. Protects against disclosures to outside parties:
Securities Investor Protection Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 438 (S.D.N.Y. 1997)
Just because the parties became adversaries did not mean that the “rest of the world suddenly becomes entitled to privileged information.”
- B. When member of joint defense becomes a government witness, can lawyers for other defendants use information provided by witness under joint defense to cross-examine?

United States v. Almeida, 341 F.3d 1318 (11th Cir. 2003) and United States v. Stepney, 246 F.Supp.2d 1069 (N.D. Cal. 2003) held that when a former JDA codefendant testifies on behalf of the government, the joint defense team can cross-examine that party on statements made pursuant to the JDA.

United States v. Almeida, 341 F.3d 1318 (11th Cir. 2003) Prosecutor informed trial court that cooperating defendant was expected to assert attorney-client privilege, so co-defendant’s attorney could not cross-examine based on statements made during joint defense sessions. The trial court prohibited cross-examination on those statements. The Eleventh Circuit reversed, holding that statements made under the joint defense doctrine “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.” Id. at 1326.

United States v. Stepney, 246 F.Supp.2d 1069 (N.D. Cal. 2003) held that when a former JDA codefendant testifies on behalf of the government, the joint defense team can cross-examine that party on statements made pursuant to the JDA. The court required any JDA to be submitted to the court, for in camera review before it takes effect and must include the following:

- a statement that it does not create either a duty of loyalty or an attorney-client relationship between an attorney and any defendant who is not his or her client;
- a provision conditionally waiving confidentiality when a lawyer who signs the JDA cross-examines a defendant who testifies, and permitting the lawyer to use any material or information provided by the testifying defendant during the joint defense; and
- a provision permitting withdrawal upon notice to the other defendants.

III. Disqualification?

In United States v. Henke, 222 F3d 633 (9th Cir. 2000) , lawyers sought to withdraw on the ground that participation in joint defense meetings would preclude them from cross-examining defendant who became a government witness. The Ninth Circuit reversed the district court’s refusal to allow them to withdraw, but stated no opinion as whether “joint defense meetings are in and of themselves disqualifying.” declined to cross-examine cooperating co-defendant where he knew of discrepancies in testimony only because information was disclosed in joint defense meetings).

In United States v. Anderson, 790 F. Supp. 231 (W.D. Wash. 1992), members of the joint defense became government witnesses, leaving one defendant going to trial. The court held that, since no information of any consequence had been exchanged, and the defendant waived any conflict arising from the JDA, the lawyers would be not disqualified.

Ethical standards:

ABA Model Rule 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

...

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

IV. Infiltration by cooperating defendant:

Weatherford v. Bursey, 429 U.S. 545 (1977), held there was no Sixth Amendment

violation where an undercover agent, believed to be a co-defendant, attended trial preparatory sessions but did not disclose any information to his superiors or to the prosecutor. The Court noted, however, that the situation may well be different if the agent had testified regarding the attorney-client communications, if “any of the State's evidence originated in these conversations;” or if “those overheard conversations [had] been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations[.]”

After Weatherford, the circuits have split as to showing required to demonstrate a violation of the Sixth Amendment.:

United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984) held that, even where confidential information was disclosed to government, disclosure was harmless.

Briggs v. Goodwin, 698 F.2d 486 (D.C.Cir. 1983) and United States v. Levy, 577 F.2d 200 (3rd Cir. 1978), held that a showing that defense information was disclosed to the government is sufficient to show prejudice.

The Ninth Circuit held that a showing of prejudice must include proof that information gained was used in some way that helped the government or hurt the defendant. United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980). The Second and Eighth Circuits agree. See United States v. Dien, 609 F.2d 1038, 1043 (2nd Cir. 1979); Mastrian v. McdManus, 554 F.2d 813, 821 (8th Cir. 1977). The Sixth Circuit has held that a showing of use to defendant's detriment is a sufficient showing. Bishop v. Rose, 701 F.2d 1150, n1157 (6th Cir. 1983)..