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Joint-Defense Agreements Helpful in Securities Cases

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Shortly after the first subpoenas or "come hither" letters are circulated by the Securities and Exchange Commission staff in a new investigation, counsel for one or more of the recipients often tries to establish a joint-defense group.

If a defense group has not been formed in the investigation phase, one often forms if the investigation evolves into enforcement action.

In either case, members of the group look to avail themselves of the benefit of the joint-defense doctrine as they collaborate in some common effort to respond to the investigation or enforcement proceedings.

All in all, joint-defense agreements help level the playing field when addressing SEC investigations and securities enforcement proceedings and prosecutions. However, members of the groups that employ these agreements must be mindful of their limitations that could lead to the loss of protection of the attorney-client privilege or potential disqualification of counsel.

The joint-defense doctrine preserves the attorney-client privilege, despite disclosure to third parties of the privileged information, when the communication is made by one defendant to counsel for another in the course of establishing a joint defense.

As explained by the 1st Circuit in United States v. Bay State Ambulance and Hosp. Rental Service, Inc., the attorney-client privilege is preserved as long as the communications were designed to further the joint defense and the privilege has not otherwise been waived.

In the 1st Circuit, the doctrine applies to both the exchange of privileged communications, as discussed in Bay State Ambulance, as well as to work product, as set forth in its 2001 decision In re Grand Jury Subpoena.

However, not all communications between members of the joint-defense group will necessarily be protected. Communications that are not made in furtherance of the joint defense, for example, will fall outside of the doctrine's protection.

Moreover, the 1st Circuit in Grand Jury Subpoena held that the prospect of litigation must have sufficiently matured for the joint defense privilege to exist.

How "joint" must the defense be?

Courts are not uniform in their articulation of how "common" or "joint" the interest must be.

The Massachusetts Supreme Judicial Court (Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc., 2007), the 1st Circuit (Bay State Ambulance), and Section 76, comment (e) of Restatement (Third) of Law Governing Lawyers have each concluded that "commonality of interests" is sufficient.

Other courts have held that the parties must share an "identity" of interests. And many courts only require that the parties share one overlapping area of legal interest and enforce the common-interest doctrine to the extent that information is shared in confidence for the purpose of advancing that interest.

Others require an absence of adversity within the proceeding as shown in the 10th Circuit's 1998 decision in Frontier Refining, Inc. v. Gorman-Rupp Co., Inc. and the 1992 ruling of the U.S. District Court of New Jersey in NL Indus., Inc. v. Commercial Union Ins. Co.

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The SJC in Hanover made clear that a written agreement is not required in Massachusetts. Indeed, Hanover suggests the joint defense protection may arise by implication, without an express agreement at all, and that the consent of the client is not even required. Likewise, the 1st Circuit appeared receptive to oral agreements in Grand Jury Subpoena.

Waiver

Jurisdictions are not uniform in determining who may waive the joint-defense privilege. In Hanover, the SJC adopted the position of the Restatement, which permits the party who made a privileged disclosure to the group to waive the privilege of its own communication.

Similarly, the 1st Circuit in Grand Jury Subpoena concluded that "[e]ven when [the joint defense or common interest] rule applies… a party always remains free to disclose his own communications."

By contrast, some jurisdictions take the position that the attorney-client privilege may only be waived if all members of the group agree to the waiver.

In either case, a member of the joint defense group should be able to trust that his or her own privileged disclosures will not be divulged by another member of the group.

Case law arising in the context of commonly represented defendants suggests a possible limitation on the protection afforded by the joint defense doctrine. Where a corporation and individual officers have common counsel, and the corporation decides to waive the privilege as to communications made by one of the jointly defended officers, the 1st Circuit in Grand Jury Subpoena held that the officer's privilege must yield to the interest of the corporation because the officer has a fiduciary duty to support the best interest of the corporation.

We have identified no case applying this rationale to the joint defense setting specifically, but officers participating in such arrangements with their corporations should be mindful that the fiduciary rationale could be expanded to that setting.

What happens when a member leaves the group?

Depending on the jurisdiction in which the joint-defense agreement is scrutinized, complications can arise when a party to the agreement leaves the group and agrees to testify on behalf of the adverse party.

Some courts, such as the 9th Circuit in United States v. Henke (2000), have held that the common-interest doctrine implicitly extends the attorney-client relationship from counsel for a single member of the group to all other members of the group, essentially deciding that each attorney for a member of the group becomes counsel to all members of the group.

This can result in disqualification of counsel from further representation of his or her client in the proceeding.

However, the majority rule is that a joint defense does not automatically give rise to new attorney-client relationships or disqualification. The risk of disqualification can be reduced by agreeing in advance that counsel participating in the defense group will not become counsel for other parties in the group, and that participation in the group will not serve as a basis for disqualification.

A federal trial judge in Massachusetts concluded in Kiely v. Raytheon Co. that a joint-defense agreement that precluded a defense group member from coming to an agreement with the government and providing information to prosecutors without the consent of the other member would be void and against public policy.

The judge wrote:

"An agreement by Kiely and Raytheon not to talk to the government without the other's consent would have given either a potential veto over the other's furnishing relevant, truthful information to investigators of criminal activity. Such a veto would obviously interfere with the investigation and might even in some circumstances amount to a criminal obstruction of justice. At the very least, it would present a sufficiently substantial impediment to the achievement of a desired public good that a contract arranging for such a veto power ought not to be sanctioned by enforcement."

Accordingly, agreements that overly restrict a member of a defense group from separately settling with the SEC or Justice Department may be unenforceable.

Laws of other jurisdictions are relevant

SEC enforcement actions may be brought in any district where any act that was part of a violation occurred. Counsel for a defense group formed in Massachusetts to address an SEC investigation may find themselves defending an enforcement action in some other district.

While all of the federal Circuits have accepted the joint-defense privilege, that privilege has different interpretations in different jurisdictions.

For example, these may include whether an identity of interest is required, and whether a joint-defense agreement creates an implied attorney-client relationship across all members of the group and all participating counsel.

The joint defense privilege is likely to be treated as a procedural matter to which the forum law will be applied. Accordingly, one eye must be cast to where the enforcement action might be brought. NEIH