Use of Joint Defense Agreements In Securities Laws Enforcement Proceedings

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It is often the case that shortly after the first subpoenas or "come hither" letters are circulated by the Securities and Exchange Commission ("SEC") staff in a new investigation, counsel for one or more of the parties who received the communications initiates an effort to establish a joint defense group. If a defense group has not been formed in the investigation phase, one often forms after investigation has evolved 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.

I. What Is The Joint Defense Doctrine?

The joint defense doctrine preserves the attorney client privilege, despite disclosure to third parties of the privileged information, "when a client by or in the presence of his or her counsel, shares privileged communications among represented co-defendants for the purpose of forming a common defense strategy." K.T. Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49, 58 (2005). Some courts regard it as an extension of the attorney client privilege. *See United States v. Bay State Ambulance and Hospital Rental*, 874 F.2d 20, 28 (1st Cir. 1989). Some treat it as an exception to waiver of privilege because of disclosure. *See Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc*., 449 Mass. 609, 612 (2007). In either case, the result is the same and parties with a common interest may share privileged information without waiving the privilege if they do so to promote a common defense.

The name common interest doctrine is sometimes used. This is a broader concept in the sense that it permits the sharing of information among co-plaintiffs or parties with common interest who are not engaged in litigation at all. Because this panel is focused on addressing potential enforcement actions by the SEC or the Justice Department, we will use the term Joint Defense throughout this article.

The doctrine emerged in the late 1880's in the context of a criminal defense. *See Chahoon v. Commonwealth*, 62 Va. 822, 21 Gratt 822 (1871). The court in that case recognized the common interest shared by co-defendants in defending the prosecution against them and determined that communication by all defendants to any counsel should be privileged. Thereafter the doctrine gained general acceptance in the criminal context. Schaffzin, 15 B.U. Pub. Int L.J at 58. The doctrine was not applied to defenses in civil matters until 1942. *See Schmitt v. Emery*, 211 Minn. 547, 555-556 (1942). While the doctrine had been widely accepted

in the civil arena,[1] the Massachusetts Supreme Judicial Court did not adopt the doctrine until 2007. *Hanover Ins. Co.*, 449 Mass. at 617. Expansion beyond the defense setting has been occurring since the 1980's, giving rise to the "common interest" nomenclature. Schaffzin, 15 B.U. Pub. Int L.J. pp. 61-65, n. 40.

II. When May The Joint Defense Doctrine Be Invoked?

The doctrine will apply when communication is made by one defendant to counsel for another in the course of a joint defense, if the communications was designed to further the effort and the privilege has not otherwise been waived. *United States v. Bay State Ambulance and Hosp. Rental Service, Inc.*, 874 F.2d 20, 28 (1st Cir. 1989). In the First Circuit, the doctrine also extends to work product. *In re Grand Jury Subpoena*, 274 F.3d 563, 574 (2001). All communications between members of the joint defense group will not 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, in the First Circuit, the prospect of litigation will have to have sufficiently mature in order for a joint defense privilege to exist. *In re Grand Jury Subpoena*, 274 F.3d at 575.

III. How "Joint" Must The Defense Be?

Courts are not uniform in their articulation of what, precisely, a "common" interest is. While some courts have held that an "identity" of interests with respect to the communications is required,[2] the SJC, the First Circuit and the Restatement have each concluded that commonality of interests is all that is required. *Hanover Ins. Co.*, 449 Mass. at 618-619; Restatement (Third) of the Law Governing Lawyers § 76 comment (e) (2000); *Bay State Ambulance*, 874 F.2d at 28 (in joint representation context). While many courts require only that the parties share one overlapping area of legal interest and will enforce the common interest doctrine to the extent information is shared in confidence for the purpose of advancing that interest, others require an absence of adversity within a proceeding.

The SJC observed in Hanover that "[c]lients rarely will have identical interests[,]" and held that the interests of the individual parties "need not be entirely congruent." *Id.*, 449 Mass. at 618, *quoting* Restatement (Third) of the Law Governing Lawyers § 76(1), comment e, *citing Eisenberg v. Gagnon*, 766 F.2d 770, 787-788 (3rd Cir.), *cert. denied*, 474 U.S. 946 (1985), *Visual Scene, Inc. v. Pilkington Bros., plc*, 508 So.2d 437, 441 (Fla. Dist. Ct. App. 1987). Similarly, the First Circuit has held, in the context of joint representation, that "[c]ommunications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests." *Bay State Ambulance*, 874 F.2d at 28, *quoting Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3rd Cir. 1985); *see also United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979).

The more restrictive view holds that "[a] community of interest exists where different persons or entities 'have an *identical* legal interest with respect to the subject matter of a

[1] Craig S. Lerner, *Conspirators' Privilege & Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 Notre Dame L.Rev. 1449, 1492 (2002). In addition, every federal circuit court of appeal has acknowledged some form of the doctrine, whether as common interest, community of interests, or joint defense.

[2] For example, *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985).

communication between an attorney and a client concerning legal advice' . . . The key consideration is that the nature of the interest be *identical*, not similar ...." *NL Indus., Inc. v. Commercial Union Ins. Co.*, 144 F.R.D. 225, 230-231 (D. N.J. 1992), *quoting Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D. S.C. 1974) (emphasis added). *Accord Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 705 (10th Cir. 1998), *U.S. ex rel. (Redacted) v. (Redacted)*, 209 F.R.D. 475, 479 (D. Utah 2001).

Several cases have held that the commonality must relate to a legal interest, and not merely a commercial interest. Where "a joint defense agreement has been proved to exist and the scope of the agreement is clear, the party seeking to claim privilege still must demonstrate that the specific communications at issue were designed to facilitate a common legal interest; a business or commercial interest will not suffice." *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 16 (D. D.C. 2005), *citing Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995). "The privilege arises out of the need for a common [legal] defense, as opposed merely to a common problem." *Id., citing Medcom Holding Company v. Baxter Travenol Laboratories*, 689 F. Supp. 841, 844 (N.D. Ill. 1988) (internal quotation marks omitted). It "requires evidence of a 'coordinated legal strategy' between two or more parties." *Id., citing Shamis v. Ambassador Factors Corporation*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999).

IV. Is A Written Agreement Necessary?

It is clear that no written agreement is required in Massachusetts. See *Hanover*, 449 Mass. at 618. Indeed, the Supreme Judicial Court in *Hanover* appears to say that the Joint Defense protection may arise out of the circumstances with no agreement at all and that the consent of the client is not even required. The First Circuit in *Grand Jury Subpoena*, 274 F.3d at 574-575, likewise appears to implicitly recognize oral agreements.

A related question is whether an oral or written agreement is preferable. Some practitioners favor an oral agreement because a detailed and lengthy agreement may carry with it unintended consequences. The Boston Bar Association, in its *Amicus* brief in *Hanover*, argued that written agreements should not be required because negotiating an agreement will add expense, may be duplicative of other arrangements, such as insurance policies, and that it may be impractical, because of the rapid way in which litigation unfolds and changes. Advocates of written agreements point out that a writing will eliminate any doubt that a joint defense exists and cover specific contingencies. *See, generally*, Casey, Peter M., *Joint Defense Agreements*, Boston Bar Journal, pp. 15-16, (November/December 2007). It can also define the scope and limits of the joint defense protection. *See, generally*, Murphy, Martin F., *Sharing Secrets: Thinking About Joint Defense Agreements*, Boston Bar Journal, pp. 31-32, (September/October 2002).

V. Who May Waive Joint Defense Privilege?

The answer is not uniform among jurisdictions. In *Hanover*, the SJC adopted Section 76(1) of the Restatement (Third) of The Law Governing Lawyers, which permits the party who made a privileged disclosure to the group to waive the privilege as to that communication. *Comment g.* The First Circuit has similarly concluded that "[e]ven when [the joint defense or

common interest] rule applies, however, a party always remains free to disclose his own communications." *Grand Jury Subpoena,* 274 F.3d at 572-573, *citing In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 922 (8th Cir. 1997). "Thus, the existence of a joint defense agreement does not increase the number of parties whose consent is needed to waive the attorney-client privilege; it merely prevents disclosure of a communication made in the course of preparing a joint defense by the third party to whom it was made." *Id.*

Some jurisdictions have taken the position that the privilege may only be waived if all members of the group agree to the waiver. *See* Schaffzin, 15 B.U. Pub. Int. L.J at 83 and cases cited. 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. As one court observed, the joint defense will be of little value if it can be cast aside by any former member. *Matter of Grand Jury Subpoena Duces Tecum Dated November16, 1974,* 406 F.Supp 381, 394 (S.D.N.Y. 1974).

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 a common counsel, and the corporation decides to waive the privilege with respect to communications made by one of the jointly defended officers, the First Circuit has held that the officer's privilege must yield to the interest of the corporation because the officer has a duty to support the best interest of the corporation. *See Grand Jury Subpoena*, 274 F.3d at 573. We have found no case applying this rationale to the joint defense setting *per se*, but officers involved in joint defense agreements with their corporations should be mindful that the fiduciary rationale could be expanded to that setting.

VI. What Happens When A Member Leaves The Group?

Depending upon the jurisdiction in which the joint defense agreement is scrutinized, complications can arise when a party to the agreement later agrees to testify on behalf of the adverse party. Some courts 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. In other words, these jurisdictions hold that each attorney for a member of the group becomes counsel to every other member of the group, resulting in something akin to a mass joint representation. *See 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[.]"), *citing United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir.1979); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp*., 559 F.2d 250, 253 (5th Cir.1977). In *Henke,* one member of a joint defense group testified at trial for the prosecution. The remaining members of the group claimed that the testimony was contrary to confidential communications he had shared pursuant to the joint defense agreement. The Ninth Circuit held that the attorneys to the remaining group members were obligated to withdraw from representation of their clients because they were unable to effectively cross-examine the side-switching witness, their obligation to their direct clients, while maintaining the confidence of the communication of the former. *Id*. at 637-638. This construction of the doctrine creates both potential ethical hazards as well as practical problems.

The court in *Essex Chem. Corp. v. Hartford Accident & Indem. Co*., 993 F.Supp. 241, 253 (D.N.J. 1998) (reversing disqualification order of magistrate), *citing Ageloff v. Noranda*, 936 F.Supp. 72, 76 (D.R.I.1996) came to the opposite conclusion holding that (whether or not an attorney-client relationship exists is determined through objective assessment of intent of both client and attorney, including indicia such as whether payment arrangements had been agreed to. A U.S. District Court sitting in Michigan adopted the position of *Essex Chem.* that a joint defense relationship does not *ipso facto* carry with it an implied attorney-client relationship amongst all group members, adding that "[t]his is in accord with the majority rule in this country." *City of Kalamazoo v. Michigan Disposal Service Corp*., 125 F.Supp.2d 219, 232 (W.D. Mich. 2000). The *Kalamazoo* Court helpfully observed that "[i]n determining whether the particular facts of a case establish the existence of an attorney-client relationship in a joint defense situation, the federal courts rely heavily on the provisions of any written joint defense agreement establishing the rights and duties of the parties and their counsel." *Id.* at 232-233 *citing Essex Chem. Corp.*, 993 F. Supp. at 252, *GTE North, Inc. v. Apache Prod. Co.*, 914 F. Supp. 1575, 1577 (N.D. Ill. 1996).

The Restatement (Third) Governing Lawyers supports the view that no implied attorney-client relationship arises from a joint defense sharing of information. The Restatement states, in setting forth the rationale of the common interest doctrine, that:

> [t]he rule in this Section permits persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers. *For example, where conflict of interest disqualifies a lawyer from representing two co-defendants in a criminal case (see § 129), the separate lawyers representing them may exchange confidential communications to prepare their defense without loss of the privilege.* Clients thus can elect separate representation while maintaining the privilege in cooperating on common elements of interest.
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> c. Confidentiality and *common*-interest rules. . . . *Separately represented clients do not, by the mere fact of cooperation under this Section, impliedly undertake to exchange all information concerning the matter of common interest*.

Comments b and c (emphasis added). We have found no authority in the First Circuit or Massachusetts, which addresses the implied representation theory.

Acknowledging the lack of uniformity amongst legal authorities on this point, some observers have suggested drafting approaches to joint defense agreements to attempt to limit the risks of such scenarios. For example, some bar associations have recommended ways of preventing counsel for a group member to avoid disqualification in the event she is required to cross-examine a former/withdrawn group member, or cross-examine a third-party witness in a manner that could conflict with the best interests of a group member who is not directly her client. For example, the New York Bar Association recommends including the following language in a joint defense agreement to mitigate the risks of potential conflicts of interest:

> Nothing contained [in this agreement] shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney . . . and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any joint defense participant who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such an attorney's participation in this agreement, and it is herein represented that each party to this agreement has specifically advised his or her client of this clause.

Lerner, 77 Notre Dame L. Rev. at 1508, n. 247, *citing* Comm. on Prof'l Responsibility, 51 Rec. of the Ass'n of the Bar of the City of New York 115, 121 (1996).[3]

It is also important to consider that, should parties to a joint defense agreement become adverse in subsequent proceedings, the previous communications between the parties pursuant to the joint defense agreement can lose their privileged status. Restatement (Third) of Law Governing Lawyers, § 76, comment f ("Disclosing privileged communications to members of a common-interest arrangement waives the privilege as against other members in subsequent adverse proceedings between them, unless they have agreed otherwise."), and cases cited.

VII. Can A Joint Defense Agreement Go Too Far?

A District Court judge in the District of Massachusetts concluded that a joint defense agreement that precluded a defense group member from making peace with the government and providing information to prosecutors without the consent of the other member, would be void as against public policy. The court stated:

> 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.

Kiely v. Raytheon Co., 914 F.Supp. 708,714 (D. Mass. 1996). Thus agreements which overly restrict a member of a defense group from separately settling with the government may be deemed unenforceable.

[3] For examples of sample joint defense agreements, *see* Steven Alan Reiss & Laraine Pacheco, *The Essential Elements of a Joint Defense Agreement*, 8 White-Collar Crime Rep. (Andrews Publ'g) No. 2, at 1 (Feb. 1994).

VIII. Should Practitioners Be Concerned About The Laws of Other Jurisdictions?

Venue for SEC enforcement actions is proper 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 wrinkles in different jurisdictions. For example, whether an identity of interest is required, and whether a joint defense agreement creates an implied attorney-client 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. Therefore, one eye must be cast to where the enforcement action might be brought.

Conclusion

Joint defense agreements help level the playing field when addressing SEC investigations and securities enforcement proceedings and prosecutions, but members of the groups that employ them must be mindful on the limitations that could lead to loss of the protection of the privilege or potential disqualification.