Joint Defense Agreements

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An Arizona case[1] shows what can happen when a joint defense agreement (JDA) doesn't adequately plan for readily foreseeable events—such as having one of the lawyers a party to the agreement leave to join a firm that later becomes counsel to a party that is adverse to the group of defendants that remains.

There, a law firm was disqualified from continuing to represent the plaintiff in a case involving groundwater contamination for several reasons, one of which was that some of the lawyers in the firm had previously been part of JDAs between potentially responsible parties who had become defendants in the case. The court analyzed the effects of JDAs and discussed the problems that can arise from them.

JDAs protect the attorney–client privilege and work-product protections for communications made and documents generated as part of a coordinated defense among co-defendants and their respective counsel. In addition—and often just as important to the lawyers involved—a well-drawn JDA can prevent disqualification of counsel should a "realignment" of the parties become necessary during litigation.

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Typically, when confidences between a lawyer and her client are shared in the presence of others, the attorney–client privilege is lost as having been waived. JDAs allow the sharing of confidential information and strategies between co-defendants and their lawyers without losing the privilege. But when one of the co-defendants and his lawyer decide to leave the group to cooperate with the opposition or to cross-claim against one or more of the others in the group, although no formal attorney–client relationship was ever formed between that lawyer and the other co-defendants as would otherwise be contemplated by our ethics rules, the law still recognizes a common law fiduciary duty—a sort of implied attorney–client relationship—between the lawyer and the remaining co-defendants, which can cause trouble for the lawyer unless dealt with initially in the JDA.

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What many lawyers don't understand is that the fiduciary relationships that are created by and between the parties and their lawyers as the result of a JDA are a function of common law principles found in the law of agency, not the rules of legal ethics.[2] These principles come into play whenever there has been an exchange of relevant confidential information between members of the JDA, the lawyer is representing a client whose interests are materially adverse to the interests of the party claiming to be protected by the JDA, and the matter is the same or substantially the same as the representation involved in the JDA.[3]

Let's take an example of a lawyer in a firm representing a co-defendant who is part of such an agreement.

The lawyer, the one working the case involved, leaves the firm, which continues to represent what is now the lawyer's former client. The lawyer is then approached by a prospective client who wants to bring an action against one of the parties in the JDA not previously represented by the lawyer. The lawyer did not have an attorney–client relationship with the prospective adversary, who may still be in the consortium, but will have common law fiduciary obligations that may well lead to his disqualification.[4]

Remember that ER 1.6 (Confidentiality of Information)[5] prohibits disclosure of "information relating to the representation." This includes all information, even that learned from sources other than the client. And if the lawyer had information relating to the prior representation that he can neither disclose nor use because of his obligations to the former client or its co-defendants, his inability to use the information might adversely affect his ability to carry out his responsibilities in the new engagement.[6] This would accordingly involve consideration of ER 1.7(a)(2) (Conflict of Interest: Current Clients), ER 1.9(c) (Duties to Former Clients) or both. Simply stated, the protections of a JDA are a function of our common law but the consequences when later disagreements arise are tested by the ethics rules dealing with confidentiality and conflicts of interest.

Many of these problems can be resolved with a well-drafted JDA. Although there is authority to the effect that the agreement

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need not necessarily be in writing,[7] if the object is to agree in advance that leaving the consortium will not subject the lawyer to later motions to disqualify him should he end up representing a client adverse to the remaining members of the group, the consent to that prospective waiver must be evidenced by a writing,[8] and only after all of the other parties to the JDA have given their informed consent—a process that requires the material risks and reasonably available alternatives to the waiver be fully explained to them.

The Comments to ER 1.7 tell us that the effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the risks that the waiver entails and warns that if the consent is general and open-ended, it will ordinarily not be effective.[9] In view of these admonitions, one of the examples of a material risk that the parties to the JDA need to be informed of is that one of the other co-defendants and/or his lawyer may "leave the formation" and become adverse to the rest of the group. It might also be pointed out that any danger of allowing the lawyer to continue his representation of the former group member in such an event would be offset by the fact that the waiver would allow any of the parties to withdraw from the group at any time and still keep his own lawyer.

endnotes

1. *River Project Agric. Roosevelt Irrig. Dist. v. Salt Improvement & Power Dist.*, 810 F. Supp. 2d 929 (D. Ariz. 2011).
2. Id. at 966.
3. Id. at 970.
4. *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977).
5. Rule 42, ARIZ.R.S.CT.
6. ABA Formal Op. 95-395, *Obligations of a Lawyer Who Formerly Represented a Client in Connection With a Joint Defense Consortium* (July 24, 1995).
7. *John B. v. Goetz*, 879 F. Supp. 2d 787, 898 (M.D. Tenn. 2010).
8. ER 1.7(b) provides that each affected client must give informed consent to the waiver, confirmed in writing; *Advance Waivers to Potential Conflicts*, ARIZ. ATT'Y (Jan. 2009).
9. Comment [21] to ER 1.7.