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PRIVILEGES

Once a Friend, Always a Friend? Joint Defense Agreements and Their Impact On Cross-Examination and Impeachment of Allies Who Turn Government Witness



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Imagine that your client's co-defendant and his attorney agree to share information with you and other co-defendants in the context of a joint defense relationship. Pursuant to that agreement, the co-defendant sits down for a series of interviews with you, with his own attorney present, wherein he relates certain exculpatory information about both himself and your client. An associate in your firm takes notes at all of those meetings and memorializes them in memos to the file. At some point in the future, the co-defendant agrees to cooperate with the government in the hope of obtaining a reduced sentence. His attorney immediately returns

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all documents he and his client obtained via the joint defense arrangement and ceases interacting with the joint defense group. During your client's trial, the cooperator provides testimony that is inconsistent with what he said during your conversations with him in the context of the joint defense. Rather than relating exculpatory facts, he changes his story entirely and inculcates both himself and your client.

Are you able to effectively cross-examine the cooperator without running afoul of your ethical and constitutional obligations? Can you use the memos reflecting the cooperator's prior contradictory statements to impeach him? Surprisingly few courts have directly addressed those questions. This article examines these questions and makes recommendations to navigate these tricky waters.

Cross-Examining a Former Joint Defense Group Member

The joint defense privilege, sometimes characterized as a limited extension of the attorney-client privilege, applies when information is disclosed among co-defendants and their attorneys for the purpose of their common defense.¹ When a member of a joint defense group abandons the joint defense and becomes a government cooperator, prosecutors often argue for the disqualification of defense counsel on ethical and constitutional grounds.² The theory is that a defense attorney who has confidential information from the coopera-

¹ *United States v. Stepney*, 246 F. Supp. 2d 1069, 1075 (N.D. Cal. 2003).

² This argument is not limited to prosecutors. Defense attorneys have also asked, usually unsuccessfully, to withdraw on the ground that a duty of loyalty among members of a joint defense group would prevent them from effectively cross-examining a cooperator should he later testify at trial and may require them to disclose confidential information acquired during a representation. See, e.g., *Stepney*, 246 F. Supp. 2d at 1072 (request to withdraw denied); American Bar Association Model Rule of Professional Conduct 1.6.

tor through a prior joint defense arrangement is unable to effectively cross-examine the cooperator, just as he would be unable to cross examine his own client, because doing so may require revealing information disclosed to the attorney in confidence. Moreover, because the attorney may be limited in his cross-examination of the cooperator, he may not be able to fully represent his own client's interests.

In *United States v. Almeida*, the Eleventh Circuit closely examined and rejected that argument.³ The court reasoned that there is no duty of loyalty between a defense attorney and a co-defendant he does not represent, eliminating any concern about a conflict of interest on the part of the attorney for the defendant left standing trial.⁴ Additionally, the *Almeida* court explained that a cooperator waives his own attorney-client privilege when he turns state's evidence, which removes the possibility of a conflict of interest from the case entirely.⁵ The court held that when the parties to a joint defense agreement are each represented by their own counsel, and when one co-defendant communicates with attorneys of other co-defendants, those communications do not receive the benefit of the attorney-client privilege when the co-defendant testifies for the government in exchange for a more favorable sentence for himself.⁶ In other words, by testifying against his co-defendants, acting in his own interest rather than in the common interest, the government cooperator abandons the joint defense privilege he once enjoyed, and counsel for his co-defendant is under no automatic ethical or constitutional impediment in cross-examining him.

Impeaching a Cooperator Using Joint Defense Materials

Even if a defense attorney is not per se subject to ethical or constitutional constraints in cross-examining a joint defense group member turned cooperator, does that hold when the attorney needs to question the cooperator using specific, confidential information obtained during the joint defense relationship? Prosecutors and cooperators have argued that information obtained during the course of the joint defense relationship is privileged and cannot be disclosed even when the cooperator has withdrawn from the joint defense.

At least one court agrees, finding that any use of confidential information, even without disclosure, may be

enough to warrant disqualification of the attorney representing the defendant on trial. In *United States v. Henke*, the Ninth Circuit considered whether an attorney had a duty to protect confidential information revealed during the course of a joint defense meeting when that information could be used to contradict the cooperator's testimony.⁷ The court ultimately found that the attorneys remaining in the joint defense group could not introduce contradictory statements, nor could they seek out further evidence to support the statements, without improperly using the cooperator's former confidences against him.⁸

The result in *Henke* appears harsh. The cooperator (or the government) could impact counsel choice merely by testifying or threatening to testify at trial. While *Henke* is still good law in the Ninth Circuit, the case seems to have been wrongly decided. This may be why other courts, while citing *Henke*, have gone to some lengths to reach different outcomes.

After *Henke*, the U.S. District Court for the Northern District of California drew a distinction between disclosing confidential information obtained in the joint defense setting and using it without disclosure. In *United States v. Stepney*, that court stated it would permit the use of the cooperator's contradictory statements on cross-examination, even though they were obtained in the context of a joint defense, as long as the joint defense agreement contained a few key provisions.⁹ The court required the agreement: (1) to be written; (2) to explicitly state that it did not create an attorney-client relationship between attorneys and defendants they did not represent; (3) contain a waiver provision informing co-defendants that they would waive confidentiality should they testify at future proceedings, whether under a grant of immunity or otherwise; and (4) to explicitly allow withdrawal upon notice to the other members.¹⁰ The court reasoned that use of information obtained in the joint defense setting was appropriate if the parties to the joint defense agreement were clear about that possibility up front.

The Eleventh Circuit in *Almeida* also permitted the use of joint defense communications to impeach a government witness, finding that the cooperator had waived the joint defense privilege when he agreed to plead guilty and testify. In doing so, the court considered the particularly severe impact a *Henke*-style rule would have on a defendant whose accomplice turns state's evidence to escape punishment himself.¹¹ The

³ 341 F.3d 1318, 1323, 73 CrL 531 (11th Cir. 2003). But see *United States v. Henke*, 222 F.3d 633, 67 CrL 736 (9th Cir. 2000) (recognizing that joint defense agreements may create a disqualifying conflict where confidential information obtained within the joint defense becomes an issue and impedes a defendant's right to counsel).

⁴ *Almeida*, 341 F.3d at 1323; see also *Stepney*, 246 F. Supp. 2d at 1079, 1085 (acknowledging that a general duty of loyalty among signatories of a joint defense agreement "has no foundation in law" and approving a waiver provision in the ABA-ALI model joint defense agreement that waived any duty of confidentiality for purposes of cross-examining a co-defendant turned cooperator); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 395 (1995) ("A lawyer who has represented one, but only one, of the parties in a joint defense consortium does not thereby acquire an obligation to the other parties to the consortium that poses an ethical bar to the lawyer thereafter taking on a related representation adverse to any of the other parties.").

⁵ 341 F.3d at 1324.

⁶ *Id.* at 1326.

⁷ See also *In re Grand Jury Subpoena Dated November 16, 1974*, 406 F. Supp. 381 (S.D.N.Y. 1975) (holding that interview memoranda created in the course of a joint defense arrangement were entitled to attorney-client privilege protection).

⁸ 222 F.3d at 637-638.

⁹ 246 F. Supp. 2d at 1081 ("An attorney might use information gained in confidence to structure an investigation for facts with which she could discredit the cooperating witness without ever disclosing the information and running afoul of either the attorney-client privilege or the duty of confidentiality.").

¹⁰ *Id.* at 1086.

¹¹ 341 F.3d at 1325 (citing *Alderman v. People*, 4 Mich. 414 (Mich. 1857), and *Jones v. State*, 65 Miss. 179 (Miss. 1888)), for the proposition that, when a co-defendant turns state's evidence, he abandons any joint defense or common interest privilege he previously enjoyed). See also *United States v. LeCroy*, 348 F. Supp. 2d 375, 387 (E.D. Pa. 2005) (government permitted to use joint defense interview notes over two defendants' objections, because a third co-defendant had insisted it

government would gain the significant advantage of a cooperating witness, while defense counsel could be disqualified.

In finding that disqualification was inappropriate and allowing the use of confidential information during cross-examination, the *Almeida* court reasoned that the justification for protecting communications between a defendant and his co-defendant or his co-defendant's attorney in the context of a joint defense is weak. "Making each defendant somewhat more guarded about the disclosures he makes to the joint defense effort does not significantly intrude on the functions of joint defense agreements" and does not implicate policy rationales supporting the attorney-client privilege, it said.¹² The court ultimately held that "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 the 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 in exchange for a reduced sentence."¹³ Unlike the Northern District of California in *Stepney*, the *Almeida* court did not impose particular requirements on the content of joint defense agreements, whether they be written or oral.

Under both *Almeida* and *Stepney*, then, defense attorneys are permitted to use contradictory statements obtained during a joint defense relationship to impeach the trial testimony of a government cooperator because they owe no duty of loyalty to the cooperator and the cooperator waives the privilege from which he previously benefited by testifying against his co-defendant.

Minimizing the Risk Of a Joint Defense Agreement

In any large, complex case, a joint defense arrangement provides a useful, confidential environment for coordinating resources and defenses. And although joint defense agreements carry some risk of conflicts, they may still be used effectively by implementing a few simple safeguards.

had a right to turn them over to the government under a joint defense agreement; by submitting to interviews anyway, two objecting defendants waived any joint defense protection).

¹² *Almeida*, 341 F.3d at 1326 (citing *Stepney*, 246 F. Supp. 2d at 1086).

¹³ *Id.* at 1326.

First, strongly consider entering into a written joint defense agreement. Whether or not a joint defense agreement is committed to writing has been the subject of a vigorous debate among defense counsel. But at least in the context of the situation described in this article, setting forth the terms of the relationship up front and getting every group member's agreement in writing will help avoid significant headaches down the road. The court in *Stepney* required a written agreement, and the Eleventh Circuit in *Almeida* strongly suggested agreements be in writing.

Second, the written agreement should specifically state that the holding in the *Almeida* case applies or should specifically include provisions addressing what happens if one member of the joint defense group becomes a cooperating witness.

Third, the written agreement should include a clause making clear that the waiver described in *Almeida* applies only to statements made to or by the now cooperating witness. There should be no confusion that there is a broader waiver.

Fourth, take care to otherwise preserve the joint defense privilege until the time that a former member of the joint defense group testifies on direct for the government. In *Almeida*, the waiver took place only when the cooperator testified in the criminal trial. Any earlier waivers could result in government discovery of joint-defense discussions.

Fifth, be prepared for the court to possibly request to examine the joint defense agreement. To the extent possible, such a disclosure should be made in camera to the court.

Conclusion

Attorneys representing clients in multi-defendant cases may be well served by a joint defense arrangement even if there is some risk that they may later be in the position of cross-examining a member of the group who cooperates with the government. Although prosecutors have previously argued for disqualification of defense attorneys in that situation and have sought to preclude defense attorneys from impeaching a government cooperator using statements made in the joint defense setting, both of those arguments have now been rejected by at least two courts. These courts have recognized the chilling effect a *Henke*-style rule would have on joint defense agreements, which serve the valuable purpose of assisting co-defendants in presenting consistent defenses.