



Alerts

Joint Defense Agreements Give Rise to Unique Conflicts and Imputation Issues

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Lawyers for the Profession® Alert

District of Columbia Bar Legal Ethics Comm. Op. 349 (Sept. 2009)

Brief Summary

A lawyer in a law firm who has participated in a joint defense agreement on behalf of a client may have contractual and fiduciary duties to the non-client parties to that agreement, which may give rise to conflicts of interest on subsequent substantially related matters. Such conflicts may be imputed from the lawyer to a firm unless there is an adequate screening mechanism.

Complete Summary

The District of Columbia Bar Legal Ethics Committee addressed conflicts of interest issues that arise when a lawyer in a law firm enters a joint defense agreement on behalf of a client. In such circumstances, some members of the defense group are not the lawyer's clients. The Committee assumed that the lawyer had received confidential information from the non-client members and that the lawyer and firm were no longer involved in the joint representation.

The Committee first addressed whether the conflicts rules apply to non-client parties to a joint defense agreement, and if so, whether such conflicts will be imputed to the firm. The Committee noted that the current client and former client conflicts rules generally only apply to conflicts between clients, which is not the case here. Rule 1.7(b)(4), however, nonetheless prohibits lawyers from representing a client when the lawyer's judgment may be adversely affected by the lawyer's responsibility to a third party. Based on this Rule, the Committee opined that a lawyer's contractual or fiduciary obligations to a non-client member of a joint defense group could give rise to a conflict with a client in a subsequent matter.

In addressing imputation of such conflicts, the Committee first pointed to Rule 1.10(a)(1), which states that Rule 1.7(b)(4) conflicts will only be imputed in certain circumstances. Namely, if the lawyer's third party interest under 1.7(b)(4) presents a significant risk of adversely affecting the representation of a client by other lawyers in the firm, the other lawyers will be barred from such representation. The Committee addressed this imputation rule in two different contexts, both involving substantially related matters after the matter with the joint defense agreement had concluded: (1) where the lawyer has switched firms, and (2) where the lawyer has remained at the same firm.

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Regarding the former, the Committee opined that the new firm could represent a client against a joint defense member by timely and effectively screening the lawyer, thus effectively eliminating any appreciable risk of an adverse effect on the representation. Regarding the latter, the Committee noted that two factors complicate the imputation issue. First, the firm itself might be a party to the joint defense agreement, and second, given the possibility that other members of the firm came into contact with confidential information from the joint defense members, enacting a retroactive screen could be quite difficult. The Committee therefore concluded that the firm likely could not represent a client against a joint-defense member unless the firm and its other lawyers were not bound by the joint defense agreement, and the other lawyers were not exposed to any confidential information related to the joint defense agreement.

Significance of Opinion

The opinion draws an important distinction between the ethical duties owed to current and former clients, on the one hand, and contractual and fiduciary duties that may be owed to non-client members of a joint defense group, on the other. The reasoning in the opinion presumably would apply equally to any common interest agreement, not only “joint defense agreements,” as such.

The issues addressed by the opinion highlight the importance of intake and ongoing conflict checks that include parties to common interest agreements, and analyzing at the point of intake whether taking on a case may inadvertently create a conflict down the road with a non-client party to the matter. The opinion points out that one effective palliative can be to establish an internal screen of the lawyers and staff working on the matter who have access to non-client confidential information.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.