

THE ETHICS OF JOINT REPRESENTATION AND JOINT DEFENSE AGREEMENTS

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DISCUSSION OVERVIEW

Note: A .pdf file containing Mr. Spahn's thorough analyses of the hypotheticals will be e-mailed to program attendees at the conclusion of this session and will also be available at the following link: <http://vae.fd.org/content/training>.

- Hypo 1: Identifying joint representation
- Hypo 2: Confidentiality duties in a joint representation
- Hypo 3: Power to waive the privilege in a joint representation
- Hypo 4: Effect of adversity among jointly represented clients
- Hypo 5: Availability of the common interest doctrine among case participants with adverse defenses
- Hypo 6: Effects of later adversity among common interest agreement participants

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Selected Hypotheticals
(adapted for criminal cases)

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Hypothetical 1

One of your firm's largest corporate clients just hired you to represent it in a criminal case filed against your client and several other companies, alleging environmental crimes resulting from the improper discharge into waterways of chemicals that your client and the other companies used in their manufacturing process. You know from experience that co-defendants in cases like this never sue each other or even "point the finger" at each other, so you tell your client that you will be able to represent it in the lawsuit. Soon after speaking with this client, you received a call from one of your partners, who tells you that she has just accepted a representation of another defendant in the case.

Is your firm's representation of these defendants a joint representation?

- (A) YES
- (B) NO

Hypothetical 2

For the past six months or so, you have been defending a wealthy doctor and his wife against charges that they murdered one of the doctor's patients, who had been blackmailing him. Both of your clients have consistently and vehemently denied any involvement in the patient's death under suspicious circumstances. A few minutes ago, the doctor called you to say that he needed to tell you something: that, in fact, he had killed his patient, but his wife had nothing to do with it and knew nothing of his involvement. This news came as a shock, because you had actually believed his denial of any wrongdoing. The doctor asked you to keep his admission to you secret from his wife.

What do you do?

- (A) You must tell your other client (the wife) about the husband's admission of guilt.
- (B) You may tell your other client about the admission, but you don't have to.
- (C) You may not tell your other client about the admission.

Hypothetical 3

You jointly represent two roommates charged with defrauding their landlord in tense negotiations with the prosecutor's office. One of your clients just called to ask whether she could provide certain documents or other information to the prosecutor during an upcoming debriefing.

(a) Without the other client's consent, may this client give the prosecutor a legal memorandum that you prepared for and sent to both of your clients

(A) YES

(B) NO

(b) Without the other client's consent, may this client disclose to the prosecutor the substance of communications that she had with you (outside the other client's presence).

(A) YES

(B) NO

Hypothetical 4

You previously represented two co-defendants who were convicted of fraud and ordered as part of their sentences to pay restitution, for which they are jointly and severally liable. While one of your former clients has been paying restitution in compliance with the judgment, the other has not – despite having amply means to do so. The paying client has now sued the non-paying for contribution, and filed a third-party subpoena seeking all of your files. The non-paying client has objected to the subpoena, claiming privilege protection for his unilateral communications with you and your colleagues during the joint representation.

Is the objecting former client likely to successfully assert privilege protection for the unilateral communications with you during the joint representation?

- (A) YES
- (B) NO

Hypothetical 5

You represent a large drug manufacturing company that has been charged by the State of California with reckless endangerment by producing a prescription drug that became badly contaminated and led to the death of many people. The state has also charged the drug distributor. Both your company and the distributor are asserting that they did not violate the law, essentially blaming each other for any possible contamination. However, you also want to cooperate with the distributor in trying to establish that the victims' deaths were caused by something else that they ingested, not the drug.

May your client enter into an effective common interest agreement with the drug distributor, despite the direct conflict of their defenses to the criminal charges?

(A) YES

(B) NO

Hypothetical 6

You represent one of several defendants in high-stakes commercial litigation, all of whom entered into a “common interest” agreement when the case began. Unfortunately, there has been a serious falling-out among the defendants, and you and your colleagues are trying to sort out its effect.

- (a) If one of the other defendants files a cross claim against your client, will it be able to use at trial any of the communications and documents that you shared with the other common interest participants under the agreement?
- (A) YES
- (B) NO
- (b) In that situation, will the other defendants be able to access and use any private communications you had with your client, which were not shared with the other common interest participants?
- (A) YES
- (B) NO
- (c) If one of the other defendants files a cross claim against your client, will you be able to represent your client in defending against that cross claim?
- (A) YES
- (B) NO