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Avoiding Conflicts With a Joint Defense Member Who Flips

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A decision last week from the U.S. District Court for the Southern District of Florida, *United States v. Vuteff*, illustrates a benefit of utilizing a written joint defense agreement properly tailored to limit future conflicts, rather than relying on the oral agreements that are common among many practitioners.

The court in *Vuteff* disqualified a lawyer whose former client was in an oral joint defense agreement with another individual who later "flipped" to cooperate with the government. It held that the agreement imposed a duty of confidentiality on the lawyer, which would be violated by the lawyer's use of information obtained through the joint defense to attack the cooperator's credibility.

This unfortunate scenario likely was avoidable. Applicable ethical guidance and case law indicate that such a disqualifying conflict can be obviated by a written joint defense agreement that expressly permits such use.

Joint Defense Agreements and the Sources of Counsel's Duties

By facilitating the exchange of information among individuals and entities facing the common threat of a government investigation, common-interest or joint defense agreements (JDAs) often are an invaluable tool to criminal defense practitioners in zealously representing their clients. Under such an agreement, counsel can share information and potentially work together to construct a unified defense strategy without fear of waiving the attorney-client privilege as to communications among themselves.

Most practitioners recognize, however, that such agreements need to be handled with care, and have the potential to create conflicts down the road if circumstances change and someone decides to leave the agreement and "flip" to become a witness for the government. That potential does not technically arise from any duty imposed on counsel by the ethical rules. Rather, it arises from case law construing the

fiduciary duty of confidentiality arising from the agreement itself.

Ethical Guidance on Duties to Former JDA Members

A lawyer's ethical duties to former *clients* are generally straightforward. New York Rule of Professional Conduct 1.9(a) provides that lawyers have a continuing duty of loyalty to former clients: Without a former client's written consent, a lawyer may not take on a new client "in the same or a substantially related matter" if that new client's interests are materially adverse to those of the lawyer's former client.

Likewise, Rule 1.9(c) provides that lawyers have a continuing duty of confidentiality to former clients: A lawyer may not disclose the sensitive or privileged information of a former client that the lawyer learned while representing that client, nor may a lawyer use such information "to the disadvantage of the former client."

Rule 1.9 applies solely to "former clients," however. It does not address former *non-clients* who participated in a JDA with a lawyer's former client. In 1995, in response to a request for guidance on the question, the American Bar Association's Standing Committee on Ethics and Professional Responsibility published Formal Opinion 95-395, which addressed lawyers' ethical obligations in connection with a "joint defense consortium" in a civil case under the ABA's Model Rules of Professional Conduct. In its opinion, the ABA concluded that a lawyer does not owe any *ethical* obligation to a former non-client member of a joint defense consortium.

The ABA went on to explain, however, that a lawyer "would almost surely have a *fiduciary* obligation to the other members of the consortium, which might well lead to his disqualification."

The New York State Bar Association's Committee on Professional Ethics has not expressly endorsed the views expressed by the ABA in Formal Opinion 95-395. The New York Rules of Professional Conduct, however, are based on, and largely mirror, the ABA Model Rules. Further, the only other jurisdiction to have addressed the issue in a formal ethics opinion, the District of Columbia, reached the same conclusion as the ABA. *See* D.C. Ethics Op. 349 (2009).

Case Law on Duties to Former JDA Members

In the wake of ABA Formal Opinion 95-395, most courts to confront potential conflicts of interest posed by JDAs have reached the same conclusion as the ABA: A lawyer generally does not have any ethical obligations to a former non-client member of a JDA, such that the lawyer automatically would be disqualified from representing a new client with interests adverse to the former non-client.

If the lawyer received confidential information from the former non-client pursuant to the JDA, however, then that lawyer has a fiduciary obligation to keep that information confidential—unless the terms of the JDA provide otherwise. *See, e.g.*, *United States v. Stepney*, 246 F. Supp. 2d 1069, 1075–76 (N.D. Cal. 2003) (collecting cases).

Courts in the Second Circuit generally have followed this approach, holding that lawyers do not owe an ethical duty of loyalty, but do owe a continuing duty of confidentiality, to non-client members of a JDA—in line with ABA Formal Opinion 95-395. *See, e.g.*, *Beras v. United States*, 2007 WL 195352, at *2 (S.D.N.Y. Jan. 24, 2007) (under a JDA, "the duty of loyalty only extends

from each attorney to the defendant which he represents," but a conflict can arise "from the use of confidential information about [one of the JDA participants] by one of his co-defendants' counsel").

For example, in *United States v. Pizzonia*, 415 F. Supp. 2d 168, 178 (E.D.N.Y. 2006), Judge Jack Weinstein explained that lawyers owe a "duty of confidentiality . . . to a co-defendant of a former client where counsel for both undertook a joint defense." The defense counsel in that case, Joseph R. Corozzo, Jr., had previously represented Richard V. Gotti—brother of John Gotti and reputed member of the Gambino crime family—and had participated in a JDA with several other alleged members of the Gambino family, including Primo Cassarino. Cassarino eventually began cooperating with the government and was slated to testify against Corozzo's new client, Dominick Pizzonia. The government therefore moved to disqualify Corozzo from representing Pizzonia based on Corozzo's prior participation in a JDA with Cassarino, a key government witness.

Judge Weinstein ultimately denied the disqualification motion, concluding that the government failed to prove that Corozzo actually had received confidential information from Cassarino relevant to Pizzonia's case. The court nonetheless recognized the potential for a conflict of interest arising from Corozzo's previous JDA, explaining that, "[i]f Gotti"—Corozzo's former client—"and Cassarino undertook a joint defense, and defense counsel was privy to confidential communications, defense counsel would be limited in his cross-examination of Cassarino under the 'common interest' rule." This inhibited cross examination, in turn, could create a divided loyalty problem warranting disqualification.

'United States v. Vuteff': A Cautionary Tale of Two Brothers

United States v. Vuteff, 22 Cr. 20306, Dkt. No. 119 (S.D. Fla. Dec. 6, 2023), affirming 2023 WL 4202644 (S.D. Fla. June 27, 2023), a recent case out of the Southern District of Florida, serves as a cautionary reminder that, in some circumstances, courts may deem obligations to a non-client arising from a prior JDA to pose a conflict of interest for future representations. The case concerns an alleged bribery and money laundering conspiracy whereby individuals allegedly paid Venezuelan officials in return for the diversion of hundreds of millions of dollars from the Venezuelan state-owned oil company Petroleos de Venezuela S.A. (PDVSA). Several individuals employed by European financial institutions then allegedly helped launder the PDVSA funds using the international banking system.

In the original criminal complaint filed in July 2018, two brothers were anonymously identified as part of the conspiracy but not named as defendants: Adolfo Ledo Nass and Alvaro Ledo Nass. After being identified in the complaint, each brother retained separate defense counsel, and Adolfo retained an experienced Miami-based criminal defense lawyer (hereinafter, Lawyer-1). Adolfo and Alvaro decided to work together to pursue a common defense strategy; accordingly, the brothers and their counsel entered into an oral JDA in August 2018.

Over the next six months, the brothers and their counsel—including Lawyer-1—had several in-person meetings and conference calls where both brothers' involvement in the alleged conspiracy was discussed. In early 2019,

Adolfo discharged Lawyer-1 and retained new defense counsel.

Over three years later, Lawyer-1 became involved in the PDVSA case once again—only this time representing a different alleged conspirator. On July 12, 2022, Luis Fernando Vuteff was indicted in the Southern District of Florida for conspiring to launder money as part of the PDVSA bribery scheme, and he retained Lawyer-1 as his defense counsel.

As it happened, at some point after Adolfo discharged Lawyer-1, Alvaro agreed to cooperate with the government. As part of his cooperation agreement, Alvaro agreed to testify at any hearings or trials in the several cases relating to the PDVSA conspiracy—including Vuteff's case.

After it became clear that Alvaro would serve as a government witness against Vuteff, the government moved to disqualify Lawyer-1 and his firm from representing Vuteff. The government argued that, even though Lawyer-1 had not previously represented Alvaro, Lawyer-1's previous participation in the JDA between Adolfo and Alvaro—and the fact Alvaro shared confidential information with Lawyer-1 as part of that JDA—created a conflict of interest precluding Lawyer-1 from representing Vuteff in a case involving the same criminal conspiracy.

The government further emphasized that Alvaro refused to waive any conflicts of interest posed by the previous JDA.

Lawyer-1 opposed the motion, arguing (among other things) that he had no conflict of interest because he had never directly represented Alvaro, and therefore owed no ethical duty to Alvaro. The district court referred the disqualification motion to the magistrate judge, and after holding four separate hearings on Lawyer-1's purported conflict of interest, the magistrate judge granted the government's motion and disqualified Lawyer-1 and his firm from representing Vuteff.

The court agreed with Lawyer-1 that he did not "owe an *ethical* obligation" to Alvaro because he never represented Alvaro directly at the time he represented Adolfo. *Vuteff*, 2023 WL 4202644, at *6. Nonetheless, referencing ABA Formal Opinion 95-395, the court concluded that Lawyer-1 did owe Alvaro a *fiduciary* duty of confidentiality:

As the ABA put it, this is not an ethical issue; it is, however, a legal issue that arises from implied fiduciary obligations to [Alvaro] if confidential information was shared under the joint defense agreement and the matter involved a substantially related matter (in this case *the same matter*).

Thus, because it was undisputed that Lawyer-1 learned confidential information from Alvaro as part of the JDA, and because Lawyer-1 sought to represent a co-defendant in the same case who was undoubtedly now adverse to the interests of Alvaro, this created a conflict of interest that precluded Lawyer-1 from representing Vuteff.

The court also declined Lawyer-1's offer to retain substitute counsel solely for the purpose of cross-examining Alvaro at trial. The court explained that, even if substitute counsel were retained for cross-examination, it would be "naïve" to conclude that Lawyer-1's representation of Vuteff "has been entirely divorced" from what Lawyer-1 learned from Adolfo and Alvaro during those privileged discussions. *Vuteff*, 2023 WL 4202644, at *6.

Conclusion: Avoiding the Pitfalls of 'Vuteff'—Get It in Writing

On Dec. 6, 2023, the U.S. District Court for the Southern District of Florida affirmed the decision

in *Vuteff* and adopted the magistrate court's reasoning in full. *See United States v. Vuteff*, 22 Cr. 20306, Dkt. No. 119 (S.D. Fla. Dec. 6, 2023). The disqualification in *Vuteff* illustrates why practitioners should consider the potential future conflicts that can arise from JDAs.

One means likely to avoid a *Vuteff*-style future disqualifying conflict is to insist on a written JDA that expressly addresses the situation where a co-defendant later decides to leave the JDA and cooperate with the government. Because courts consistently have held that a lawyer does not owe any *ethical* duties to non-client members of a JDA, the only duties a lawyer might have stem from the agreement reached among the co-defendants. In *Vuteff*, the JDA was oral—as is a common practice in many jurisdictions, including New York—and the court presumed that Vuteff's lawyer owed a fiduciary duty of confidentiality to Alvaro.

A written JDA, however, can be tailored to provide that if any member of the JDA later testifies for the government, lawyers for other JDA members may cross-examine the testifying former member using all information or materials in their possession, including information obtained through the JDA. Indeed, such a waiver provision is recommended in the model joint defense agreement published by the American Law Institute and the American Bar Association. *See Stepney*, 246 F. Supp. 2d at 1085 (citing Joint Defense Agreement, Am. Law Inst.-Am. Bar Association, *Trial Evidence in the Federal Courts: Problems and Solutions* at 35 (1999)). Courts have held that such written waivers obviate potential conflicts of interest.

Practitioners who commonly rely on oral JDAs may point to the time and energy required to negotiate the precise terms of a written JDA, and counsel's ability to limit information sharing in situations where they perceive risk that a joint defense member may desert the group. The significant likely benefit of such express waiver language, however, provides a forceful counter-argument in favor of a written JDA.

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