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RECONCEPTUALIZING THE JOINT DEFENSE DOCTRINE

Deborah Stavile Bartel*

"A common defense often gives strength against a common attack."¹

INTRODUCTION

THE shape of prosecutions in the late twentieth century suggests that prosecutors believe “the more, the merrier.” The Department of Justice’s focus on concerted conduct involving narcotics distribution and white collar crime results in a fair degree of frequency of multiple co-defendants charged in a single indictment. One grand jury investigation explores the possible criminal responsibility of several targets. A single trial typically determines the liability of all indicted. In such instances, each individual’s fate depends upon his ability to join with co-defendants to mount a coordinated counterattack on the government’s proof.

Whether a trial involves a single defendant or multiple defendants, a fair trial must be assured to each. Since inconsistent defenses condemn one another to failure, a fair trial requires that co-defendants have an unpunished opportunity to coordinate the defense. Frequently, co-defendants find it in their interest to exchange information, pool labor, and launch a uniform theory to rebuff the prosecution’s legal attack. While information gathering is critical to mounting a defense, there are few opportunities for formal discovery in criminal cases. Joint defense groups facilitate the voluntary exchange of information and allow coordination among co-defendants.

Confidentiality of communications is essential to joint defense groups. Communications in pursuit of a joint defense will not occur if the prosecution is able to discover their content. Recognizing this, courts have protected the confidentiality of these communications² under a doctrine commonly known as the joint defense privilege or

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¹ Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting).
² See, e.g., In re Grand Jury Subpoenas, 902 F.2d 244, 248 (4th Cir. 1990) (noting that confidentiality protection applies to criminal proceedings); United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) (finding this communication protected in a criminal proceeding). But see Sheet Metal Workers Int'l Ass'n v. Sweeney, 29 F.3d 120, 124 (4th Cir. 1994) (declining to extend this protection in a civil proceeding).

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the common interest rule. Although this protection was developed to protect and promote the litigation posture of the multiple co-defendants, its present theoretical conception, as part of the attorney-client privilege, has transmogrified it into one of the sharpest arrows in the prosecution's quiver. As all defense parties know, defection is a common event, and today's co-defendant frequently turns into tomorrow's prosecution witness. A unified defense shared by separately represented co-parties raises vexatious questions concerning the ethical propriety of continued representation and cross-examination of defectors when a joint defense member withdraws to testify as a witness for the government.

Prosecutors contend that the defector is entitled to preserve the confidentiality of his communications to the joint defense group even at the expense of the remaining members. The argument posed is that lawyers for the co-defendants owe the defector a duty of confidentiality, thereby prohibiting cross-examination based on his confidential joint defense communications. The argument continues that the lawyers also owe their clients continuing to trial a duty of undivided loyalty.

Prosecutors conclude therefore, that the lawyers for co-defendants continuing to trial face an actual conflict of interest between the duty of loyalty and vigorous representation owed the client standing trial and the duty of confidentiality owed the testifying government witness. Accordingly, prosecutors contend that disqualification is appropriate. Currently, whenever a joint defense member withdraws to cooperate with the government, the joint defense doctrine threatens to detonate the defense by disqualifying the defense lawyers and denying the defense the use of information gathered from the defector during the joint defense effort.

These significant threats chill joint defense groups from forming. The present construction of the joint defense privilege burdens the constitutionally protected right of multiple co-defendants to pursue a

3. See Schwimmer, 892 F.2d at 243; Daniel J. Capra, Attorney-Client Privilege When Parties Share Interests, N.Y. L.J., Mar. 9, 1990, at 28 [hereinafter Capra, When Parties Share Interests]. The common interest rule uses the "either" nomenclature because the rule protects the confidentiality for any co-parties in the litigation, co-plaintiffs as well as co-defendants.


7. The threats are real because no member of the joint defense group can prevent a co-defendant from testifying as a government witness; the government retains control over this. The government may induce defection by either an attractive plea bargain or a grant of immunity coupled with compelled testimony.
coordinated defense in criminal cases.\textsuperscript{8} Disqualification of one's counsel of choice is bitter medicine to swallow and burdens the Sixth Amendment's presumption in favor of retained counsel of choice.\textsuperscript{9} As a practical matter, it is expensive and psychologically difficult to switch lawyers in the middle of a criminal case. Faced with the prospect of disqualification of his lawyer, a defendant may lack the fortitude to stand trial, and may simply plead guilty. The defendant may agree to sacrifice the use of the witness's joint defense communications on cross-examination to avoid having his lawyer disqualified.\textsuperscript{10} The client may be forced to compromise his confrontation rights or lose the constitutional presumption in favor of counsel of choice. The client may also lose the benefit of his bargain with the defector, who now has the power to deprive the joint defense members of the use of information he gave co-defendants to assist their defense.

Deterring the formation of joint defense groups, however, undermines the search for truth. Our adversary system demands balance to achieve its truth-seeking mission and to function fairly. A trial becomes a lopsided contest when multiple co-defendants are discouraged from coordinating their defense and present unnecessarily inconsistent defenses. Relegating defendants to uncoordinated and inconsistent defenses bestows an unfair tactical advantage on the prosecution because inconsistent defenses impair the credibility of the defense as a whole. The presentation of inconsistent defenses also lengthens a trial's duration, consuming more of a court's time than otherwise would occur. Deterring joint defense groups causes inefficiency that our criminal justice system cannot afford, and undermines the search for truth by thwarting information sharing between defendants.

Although the joint defense doctrine was recognized to encourage co-defendants to pursue coordinated defenses, its construction as part of the attorney-client privilege now defeats this purpose. The strict confidentiality requirements of the attorney-client privilege are the source of the problem. Courts intend the joint defense privilege to facilitate communications among co-defendants and to aid the preparation of their common legal defense rather than to serve as a weapon in the hands of aggressive prosecutors. The current interpretation of this protection discourages co-defendants from participating in joint defense groups. It is appropriate to reexamine the conceptualization

\textsuperscript{8} United States v. Jones, 44 F.3d 860, 873 (10th Cir. 1995). In Jones, the court assumed that the ability to plan and pursue a joint defense is incorporated into a defendant's personal Sixth Amendment rights. The Jones court found no such violation where the defendant had the ability to communicate without interruption with counsel for co-defendant, including interim counsel. \textit{Id}.


of the joint defense privilege to eliminate this incoherence. This Article suggests a theory of protection for joint defense communication that stands independently of the attorney-client privilege. This posited construction of the joint defense doctrine avoids the problems that arise when a member withdraws from the joint defense group to become a government witness. It redefines the scope of the duty of confidentiality attaching to joint defense communications and tailors it to meet the policy objectives supporting the protection.

While the thesis of this Article is that the joint defense privilege is distinct from the attorney-client privilege, the joint defense doctrine nevertheless shares some goals of that privilege and of the work product doctrine. Despite these shared goals, this Article argues the joint defense doctrine operates more in the nature of a doctrine of protection than a privilege and should be independently recognized as such. This new doctrine is narrower and more flexible than the attorney-client privilege and the work product doctrine. It would continue to bar prosecutors from discovering statements by non-defecting joint defense members, thus promoting the formation of joint defense efforts. This Article demonstrates, however, that the joint defense doctrine should permit the use of a testifying defector’s joint defense communication during his cross-examination. Using a fiduciary duty model, this Article explains that the joint defense doctrine should allow those who receive confidential joint defense communications to exploit that information for their defense even when defection occurs. By redefining the scope of confidentiality, all threats of attorney disqualification disappear.

Part I of this Article explores joint defense arrangements. The part first discusses how joint defense groups work, and then examines the hostility toward joint defense groups. Finally, part I discusses the social benefits flowing from joint defense arrangements and concludes that the benefits outweigh any theoretical ills. Part II traces the historical rise of the joint defense privilege and outlines the privilege’s scope and present construction as an adjunct to the attorney-client privilege. Part III examines the ethical and constitutional issues that arise with the present construction of the joint defense privilege when one member of the joint defense group defects to become a testifying government witness while other co-defendants proceed to trial. Part IV reconsiders the privilege as an independent doctrine. This part articulates a policy rationale for protecting joint defense communications, separate and apart from the attorney-client privilege and work product doctrine. It also contrasts the joint defense doctrine with the attorney-client privilege and the work product doctrine. In addition, this part outlines the nature and scope of the duty of confidentiality that the joint defense requires to achieve its purpose: the promotion of joint defense arrangements to protect a fair trial. This Article con-
cludes that a separate joint defense doctrine should not deny joint defense members the use of defectors’ statements to the group.

I. JOINT DEFENSE ARRANGEMENTS
   A. Joint Defense Groups at Work

Joint defense groups are arrangements in which co-defendants who are represented by separate lawyers agree to cooperate with each other in formulating their legal position. Co-defendants may agree to cooperate because they have matters of common legal interest, believe it is in their mutual interest to coordinate legal strategy, or believe it may be mutually advantageous to share information and divide the work of litigation between the various separate lawyers.

The cooperative arrangement can take a variety of shapes. Sometimes the lawyers exchange legal or factual memoranda without sharing client confidences. Sometimes the lawyers meet and disclose, either orally or via memoranda, their respective clients’ confidential statements. Other times, the lawyers and co-defendants find it best to meet together to discuss joint defense strategy. It also happens that in pursuit of a joint defense, the lawyer for one co-defendant, or one of the lawyer’s agents—such as a criminal investigator or an accountant—may meet separately or communicate directly with a co-

11. Much, if not all, of the discussion in this Article is applicable to civil proceedings. Joint defense arrangements are beneficial in the civil context as well as the criminal context. Because the criminal context poses constitutional twists not confronted in civil matters, this Article primarily grapples with the issues in a criminal context.

12. The work product doctrine alone should be sufficient to protect these exchanges so long as confidential client communications are not contained therein. See Restatement (Third) of the Law Governing Lawyers §§ 136-38 (Tentative Draft No. 5, 1992).

13. See, e.g., Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964) (grand jury post mortem); Schmitt v. Emery, 2 N.W.2d 413, 416-17 (Minn. 1942) (civil statements), overruled in part by Leer v. Chicago, 308 N.W.2d 305, 309 (Minn. 1981).

14. See, e.g., Hunydee v. United States, 355 F.2d 183, 184 (9th Cir. 1965) (involving husband and wife who were targets of grand jury investigation and whose lawyers met together to discuss husband’s plea strategy); In re Grand Jury, 406 F. Supp. 381, 384-85 (S.D.N.Y. 1975) (describing the defense strategy between targets of the grand jury investigation and their lawyers); Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 835 (1871) (discussing the attendance of two lawyers and all three co-defendants at a pretrial defense meeting).

Today, many lawyers participating in joint defense groups shy away from meeting directly with the co-defendants of their clients to avoid the appearance of creating an attorney-client relationship. See Ethical Implications, supra note 6, at 116-17. Perhaps the only thing worse than meeting with a co-defendant who is not the lawyer's client is to meet with him alone. This reluctance to meet with co-defendants directly most probably springs from fear of disqualification should the witness decide to become a government witness and require cross-examination at trial. The threat of disqualification would be removed by the conceptualization of the privilege protecting joint defense communications posited by this Article. See infra part IV.B. Removing the threat of disqualification would likely end the distaste for lawyers communicating directly with the co-defendants of their clients in the joint defense group, which sometimes will be the appropriate and more efficient way of developing a joint defense.
defendant who is not his client in the absence of that co-defendant’s lawyer. 15

Although there is cooperation on matters of common interest, joint defense groups do not behave like a single client unit. The joint defense arrangement is distinguishable from the situation of multiple representation, where a single attorney represents multiple clients in a common matter. In the case of a single attorney representing multiple clients as a single client unit, the clients either do not have conflicts of interest or they are willing to accept the risks that may flow from common representation by a lawyer who may develop conflicts of interest. These risks include disqualification of counsel due to conflicts of interest or representation by counsel with divided loyalties. The clients in such a situation believe their legal interest is best represented by a single lawyer. A contractual agreement will exist between each of the co-defendants and the single lawyer, creating an attorney-client relationship. Each client looks to the common lawyer as his own lawyer. This arrangement works best when clients have sufficient unity of interest that one common lawyer can adequately protect all.

When multiple clients communicate with the common lawyer representing them, they speak freely. They act like a single client unit. They believe and behave as if the information they convey will be used for their benefit to advance their unified legal position. They act with knowledge that the information shared amongst themselves will remain confidential unless they subsequently become adversaries in court. The clients jointly educate the lawyer on the facts, jointly control the direction of the legal matter, jointly agree upon a tactical strategy and, in this way, direct their common lawyer to represent them in the manner that achieves, in their judgment, their best interest. Little or no thought is given to one client switching sides and testifying against the others. In the context of common representation, the scope of a confidentiality duty for communications between the lawyer and clients is absolute as to the outside world, but there is no confidentiality between the client members. 16

The case of co-defendants allied in a joint defense group but represented by separate counsel is fundamentally different. With the joint defense arrangement, each individual co-defendant enters a contractual attorney-client relationship with only one lawyer. 17 Each co-de-

16. Except if the clients stand adverse in a subsequent litigation. See infra note 207.
17. Joint defense arrangements are complicated by the fact that sometimes the attorneys' fees for all of the co-defendants participating in the joint defense group are paid by a single co-defendant or someone not named as a co-defendant. For example, in cases involving criminal investigation of corporate wrongdoing, the corporation may agree to pay its employee's attorneys' fees in connection with a grand jury investigation and trial, but only if the employee participates in a joint defense arrangement
fendant knows that he is the client of his separately retained lawyer and that the other co-defendants have their own lawyers. Here the co-defendants either believe there is a conflict of interest between them or they refuse to accept the risks that representation by a single lawyer could entail. They do not share a unity of interest in the outcome of the case. In criminal cases, the guilt of each defendant must be individually assessed by the jury. The jury considers evidence connecting each defendant to the criminal scheme or conspiracy. Unlike civil cases in which defendants may have obligations of contribution in the payment of damages if they are jointly liable, in criminal cases, multiple defendants found liable do not share their punishment: each serves his own term of imprisonment.

Although co-defendants in joint defense arrangements agree to share information limited to areas of common interest, their communications are frequently guarded. Each co-defendant typically “holds something back” from the others, just in case. Even if one co-defendant does not hold back something, he may fear that his co-defendants are being less than completely candid. Co-defendants enter a joint defense arrangement mistrustful of one another, with the knowledge that one or more of them may at any time decide to withdraw and become a cooperating government witness and “sell the others down the river.” When co-defendants with separate counsel communicate in joint defense groups, their conduct and expectations do not conform to the model of one cohesive attorney-client unit, in which a single lawyer represents multiple clients.

The client expectations in the two situations are also different. In the single client unit, each client expects the lawyer to do his best for him, to be loyal to him, but within the confines of the group’s overall goals. He consents to the conflicts of interest, if any, or is prepared to

with the corporation’s lawyers. In narcotics, or other cases, attorneys’ fees might be paid by one co-defendant for all co-defendants, or by someone not charged, as an expense of the on-going business. “Benefactor payments” of attorneys’ fees also occur in certain group criminal activities, such as crimes involving narcotics distribution and other conspiracies. United States v. Aiello, 814 F.2d 109, 111-12 (2d Cir. 1987); United States v. Padilla-Martinez, 762 F.2d 942, 947-48 & n.1 (11th Cir.), cert. denied, 474 U.S. 952 (1985). “It is not uncommon in organized crime cases, for example, for a defense lawyer to represent one defendant while receiving payment from a different defendant or target.” Bruce A. Green, “Through a Glass, Darkly”: How the Courts See Motions To Disqualify Criminal Defense Lawyers, 89 Colum. L. Rev. 1201, 1227 n.116 (1989); Laurie P. Cohen, Issue of Lawyer’s Loyalty Is Raised by Drexel Employee’s Conviction, Wall St. J., Mar. 24, 1989 at B3; see also Gary T. Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 960-61 (1978) (noting advantages to both employer and employee when former pays the latter’s lawyer).

18. While it may be a theoretical possibility that criminal defendants could be jointly liable for making restitution to a victim, a right of contribution among criminal co-defendants seems contrary to public policy and research does not disclose case law supporting this idea.

change counsel if conflict ripens and proves unacceptable to him. Where a single lawyer commonly represents multiple co-defendants, his ethical obligations run to all clients. The lawyer cannot prefer one client above the other clients. He must advise the clients of any conflict of interest, and the clients must decide whether to put the group's interests before their own.

In the situation of the joint defense group, however, each client expects loyalty from his own lawyer, not from a co-defendant's lawyer. There is no expectation by the participants of a joint defense arrangement that a lawyer will put the good of the group ahead of the good of his individual client. The clients also do not anticipate a conflict that would require a change of counsel. Defendants retain separate counsel to prevent conflicts of interest, yet join joint defense arrangements to provide cohesion to the defense.

A defendant communicating with his own lawyer has received the benefits contemplated by the attorney-client privilege without the joint defense doctrine. In the joint defense arrangement, the communicating defendant speaks with the purpose of advancing the legal interest of the co-defendant. In return, he has only the unsecured expectation that a co-defendant will reciprocally share information with him.

A communicating defendant can also hope that through his communication of information, he has enabled his co-defendants to avoid raising a defense that is unnecessarily inconsistent with his legal position. The co-defendant has no duty to avoid offering an inconsistent defense, but co-defendants can choose to avoid inconsistent strategies if they have knowledge of one another's theories and strategies. Co-defendants in a joint defense arrangement do not behave as a cohesive client unit, but rather pursue their separate legal interests, which will sometimes coincide.\textsuperscript{20} Throughout the defense, each member of the joint defense group is out for himself and has assumed no obligation to the contrary.

Co-defendants in a joint defense group are also unlike a nontraditional group client, such as a trade association. Where a trade association is the client, for example in an antitrust matter, the lawyer for the trade association may have direct communication with the constituent members of the trade association to gather necessary information. Because the constituent members comprise the trade association, the fate of the claims against the trade association has a direct impact upon the continued behavior of the constituent members. It is appropriate to extend the attorney-client privilege to govern communications between the lawyer and the members of the trade association. It also may be correct to recognize the duties of the attorney-client rela-

\textsuperscript{20} See id. Cheng offers a stark example of co-defendants pursuing their separate legal interests despite the agreement to a joint defense effort. Id.
tionship between the lawyer and the constituent members, so as to preclude the lawyer from representing someone who is an adversary of the member of the trade association in a substantially related matter. Co-defendants, however, in a joint defense group are less closely affiliated than members of a trade association. Unlike a trade association, the legal fate of any co-defendant has no necessary impact upon any other co-defendant. Thus, the model of the attorney-client relationship in this context may teach little about the appropriate scope of confidentiality between co-parties who have entered into a joint defense arrangement.

B. Hostility to Joint Defense Groups

While it is true that joint defense arrangements may crumble because they face a pervasive threat from the possible antagonistic positions of its members, it cannot be ignored that joint defense arrangements offer substantial benefits to the participants, to the adversary system, and to the public. Despite these benefits, joint defense efforts are frequently viewed with suspicion in some quarters? Prosecutors oppose confidentiality for joint defense communications, because it shields relevant and probative evidence from the fact finder thereby hindering the determination of criminal responsibility of those accused of a crime. Prosecutors also fear that joint defense arrangements may include unlawful efforts to impede justice, provide a group of co-defendants with the opportunity to influence improperly the memories of witnesses, or otherwise permit a concerted attempt to obstruct grand jury investigations. Others have voiced suspicions that the confidentiality afforded joint defense groups may allow criminal conspiracies to continue.

It is, however, unreasonable and unfair to presume that clients and lawyers act unlawfully in joint defense arrangements. Furthermore, it is inappropriate to rely on generalizations about the ethical probity of defense attorneys. Indeed, because lawyers and clients witness such misconduct, lawyers in joint defense groups may be more careful to avoid impropriety than when defending alone. Nor should we assume

22. For a discussion of the benefits of joint defense groups, see infra part I.C.
24. Id. "Prosecutors are uneasy because they see in joint defense agreements, even intentionally, an opportunity to get together and shape testimony." Id.; e.g., Top Lawyers Are Subpoenaed in BCCI Probe, Am. Law., Apr. 27, 1992, at 72 (prosecutors suspected that joint defense agreement interfered with the grand jury's receipt of subpoenaed documents until assured in writing by defense counsel that they had complied properly with the subpoenas).
25. Charles W. Wolfram, Modern Legal Ethics 278 (1986) ("It permits coconspirators to continue to conspire at a common defense, now with the privileged assistance of teams of lawyers.").
26. Green, supra note 17, at 1228.
that joint defense groups mask continued group criminal activity of
the co-defendants. If we are to believe the government's evidence
from the criminal investigation, it is apparent that the clients did not
need or wait for the protection of confidentiality of a joint defense
agreement to engage in group criminal misconduct. The joint defense
agreement does not significantly enhance the opportunities to engage
in concerted secret criminal activity. To the contrary, having lawyers
injected into the group through joint defense arrangements should sti-
Jtle further criminal activity except in the rarest instances when the
lawyers participate in criminal activity. There is, however, no reason
to believe this is the norm of the defense bar.

C. The Benefits of Joint Defense Arrangements

Information is the *sine qua non* of mounting a successful defense.
When there are multiple co-defendants, sharing information is critical
to effective representation. Information-sharing occurs naturally
when one lawyer represents multiple clients with similar interests be-
cause the attorney-client privilege protects the confidentiality of their
communications. After *Wheat v. United States*, the norm is separate
representation for criminal co-defendants.

Joint defense groups are essential in criminal cases because of the
dearth of information made available to the co-defendants. The Fifth
Amendment privilege against self incrimination precludes the type of
formal discovery from co-defendants that happens in civil cases as a
matter of right. Additionally, the right to discovery from the prose-
cution is limited. Although access to relevant information is essen-
tial for a fair defense, the only means of obtaining such information in
criminal cases is to permit cooperation among the co-defendants and
encourage the voluntary exchange of the information. Given the ab-
sence of formal discovery, the formation of joint defense groups to
promote the voluntary exchange of information is neither surprising
nor suspicious. Without joint defense groups, defendants are deprived

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27. See Capra, *When Parties Share Interests*, supra note 3, at 28 nn.13-15 and
accompanying text.

28. 486 U.S. 153, 162-63 (1988) (holding that courts may disqualify counsel who
represent multiple co-defendants in a criminal case even where the clients knowingly
and voluntarily waive the right to conflict-free counsel).

29. See *Fed. R. Civ. P. 26(b)*. Joint defense groups are still appropriate in civil
cases because coordinating of efforts enables each side to present its best case, serving
the adversarial system's goal of fairness.

30. The prosecution's discovery obligations are laid out in the Federal Rules of
Criminal Procedure. Unless a court otherwise orders, prior statements of government
witnesses are available to the defense after the direct examination of the government
witness. 18 U.S.C. § 3500(b) (1994). Furthermore, exculpatory or mitigating evidence
or material evidence otherwise favorable to the defense must also be provided. E.g.,
Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987); United States v. Agurs, 427 U.S. 97,
of information, and consequently, denied a meaningful opportunity to defend themselves by a coordinated defense.

Joint defense groups—as distinct from the situation when one lawyer represents several co-defendants—are frequently needed in criminal cases because co-defendants have adverse interests and require separate counsel. Above all, each defendant “wants . . . to protect his own skin, even at the cost of his compatriots’ hides being nailed to the barn door.” Yet, the co-defendants may well have information they can share with one another without harming their own interests. Separate counsel solves the problems presented by conflicts of interest but creates vacuums in the knowledge of each defendant. These information vacuums can damage the ability of each co-defendant to mount an effective defense. Joint defense groups, however, allow each attorney to fill knowledge gaps.

Still another reason in favor of joint defense groups is that when co-defendants are tried together, it would amount to suicide for them to offer inconsistent defenses to the fact finder. Coordinated strategy is important to success. A cacophony of inconsistent defense theories places co-defendants in a significantly worse credibility position than a defendant standing trial alone. It is unfair to impose this disability on multiple co-defendants tried together. To avoid such disparity, co-defendants must be allowed to coordinate their defense if they deem it beneficial. A joint defense allows co-defendants to weed out weak and unnecessarily inconsistent defenses and to develop defenses without injuring the legal position of co-defendants. This enables the defense to present its “best” case while serving the goals of the adversary system.

When properly used, the joint defense arrangement provides balance to the adversary process. Whether the case is civil or criminal, the balance necessary to the adversary system does not exist if one side has a coordinated strategy and access to information while the other side does not. In criminal cases, more complete information from co-defendants may disclose the strength of the government’s case and help a defendant make a more informed decision about whether to plead guilty. In addition, the adversary system benefits as a whole from information sharing between defendants about weaknesses in the government’s case, because a defendant’s access to knowledge prevents the government from having unfair plea bargaining leverage.

32. Id.
33. In a civil action where discovery offers greater access to the facts, joint defense groups are still beneficial. More complete information may be available through voluntary sharing between parties with common interests than discovery would require. In civil cases, information that otherwise might not be disclosed, might be shared voluntarily. That information, however, would not be disclosed if the attorney-client
Our adversary system of justice ideally contemplates a contest between equals. Each side is expected to put forth its best case. It is appropriate to pursue this societal goal through the law of evidence. Unless we allow co-defendants a confidential opportunity to coordinate a unified theory, co-defendants are relegated to offering inconsistent defenses. Such defense behavior helps the prosecution secure convictions. Encouraging co-defendants to communicate about trial strategy is the only way to assure a contest of equals. These communications guarantee the defense the ability to make the most effective use of information through common strategy.

Another benefit of the joint defense privilege is its efficient use of scarce judicial resources. Information shared in a joint defense arrangement may persuade a defendant to plead guilty and avoid trial. Trial time may be shortened because duplicative cross-examination is eliminated. Furthermore, a trial may be streamlined because time consuming and unnecessarily inconsistent defenses would be weeded out through the coordinated effort.

Joint defense efforts also enable co-defendants to share the labor involved in trial preparation and cross-examination at trial. The research of common legal issues, evidentiary or substantive, can be shared. Additionally, sometimes the labor entailed in preparing common motions and writing briefs as well as investigating and developing factual material can be shared. Lawyers can divide the work and designate who will be in charge of the cross-examination of particular...
government witnesses.\textsuperscript{36} This division of labor assists the adversary system because it promotes better preparation and a more thorough analysis of the government's case. Both sharing labor and pooling resources reduces the staggering expense of litigation.\textsuperscript{37}

A joint defense arrangement also can be helpful to a corporation seeking to investigate suspicions of internal corporate wrongdoing. Without the cooperation and assistance of the employees allegedly involved in the wrongdoing, it is more difficult to investigate possible misconduct that a corporation would like to eradicate. Employees are more likely to cooperate in an internal investigation being undertaken as part of a joint defense effort because their legal interests also will be protected.\textsuperscript{38} Thus, the joint defense arrangement can promote the corporation's interest to abide by the law.

Joint defense arrangements also help procure legal representation for people who otherwise might lack the financial means to hire a lawyer. In civil cases and in criminal cases before the right to counsel has attached,\textsuperscript{39} many cannot afford the expense of hiring a lawyer. For example, a corporate employer may be willing only to pay its employees legal fees in civil or criminal cases if the employees enter into a joint defense arrangement.\textsuperscript{40} This is also true in criminal cases, someone may be willing to defray the cost of legal representation for another if they have appropriately agreed to pursue a joint defense effort. So long as the lawyer's loyalty runs to his client, rather than to the person paying the lawyer's fees, there is a net benefit conferred by this legal representation for someone who otherwise would not be represented. Joint defense arrangements work to level the playing

\textsuperscript{36} Division of labor in cross-examination does not mean that only some of the lawyers cross-examine a witness. Instead, one lawyer may undertake the bulk of the work in conducting the substantial factual investigation relevant to that witness and take the lead in developing the most thorough cross-examination designed to discredit the witness. Multiple co-defendants would benefit from these efforts.

\textsuperscript{37} The public at large can benefit from the litigation cost savings achieved by joint defense groups because the defense of indigents accused of crime is funded by public tax dollars. Joint defense groups achieve this efficiency without compromising the legal interests of any of the co-defendants.

\textsuperscript{38} Although a corporation and its employees may share a joint defense effort in connection with an internal investigation, they do not always do so. An employee's mistaken belief about the existence of a joint defense arrangement does not give rise to the confidentiality protection of the joint defense doctrine. United States v. Sawyer, 878 F. Supp. 295, 297 n.1 (D. Mass. 1995).

\textsuperscript{39} The Sixth Amendment right to counsel guarantees each person accused of a crime legal representation at every critical stage of the prosecution. The public will bear the expense if the defendant is indigent. Gideon v. Wainwright, 372 U.S. 335, 339-45 (1963). The right attaches upon indictment or upon the defendant's first court appearance. During the grand jury investigation, if the defendant has not made his first court appearance, he is not entitled to legal counsel under the Sixth Amendment. Consequently, unless he can afford the expense of a lawyer, he will not have one to represent his interests during the investigation stage of the proceedings.

\textsuperscript{40} See Scheininger & Aragon, supra note 31, at 13-14.
field, serving the search for truth and the interests of justice, as those
goals are realized within the context of an adversary system of justice.

Courts have not elaborated on the substantial benefits that joint de-
fense arrangements bestow on the litigation process. Although courts
have not examined the benefits discussed above, courts have recog-
nized other utility in protecting the confidentiality of joint defense
communications.

The joint defense privilege is necessary because "[t]he need to pro-
tect the free flow of information from client to attorney logically exists
whenever multiple clients share a common interest about a legal mat-
ter."41 The joint defense privilege is "meant to recognize 'the advan-
tages of, and even, the necessity for, an exchange or pooling of
information between attorneys representing parties sharing such a
common interest.'"42 Courts have noted that: "[A] cooperative pro-
gram of joint defense is helpful or, a fortiori, necessary to form and
inform the representation of clients whose attorneys are each sepa-
rately retained."43 The joint defense privilege enables counsel for cli-
ents "facing a common litigation opponent to exchange privileged
communications and attorney work product in order to adequately
prepare a defense without waiving either privilege."44 The court in In
re Grand Jury Subpoenas45 offered further justification:

Whether an action is ongoing or contemplated, whether the jointly
interested persons are defendants or plaintiffs, and whether the liti-
gation or potential litigation is civil or criminal, the rationale for the

Trial L.Q., Summer 1989, at 21 (citation omitted) [hereinafter Capra, Common
Representations].

579 (S.D.N.Y. 1960)). Defendants with common interests in multiple defendant cases
"are entitled to share information protected by the attorney-client privilege without
danger that the privilege will be waived by disclosure to a third person." Wilson P.
Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977)
("[W]hen information is exchanged between various co-defendants and their attor-
nies that this exchange is not made for the purpose of allowing unlimited publication
and use, but rather, the exchange is made for the limited purpose of assisting in their
at *5 (N.D.N.Y. Sept. 28, 1992); accord In re LTV Sec. Litig., 89 F.R.D. 595, 604 (N.D.
Tex. 1981) ("The assurance of confidentiality is as important and appropriate where a
cooperative program of joint defense is helpful or necessary to represent clients
whose attorneys are separately retained as it is where co-defendants have engaged
common counsel.").

43. In re Grand Jury Subpoena, 406 F. Supp. 381, 388 (S.D.N.Y. 1975); accord
Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 841-42 (1871) (recognizing "a
right, all the accused and their counsel [had] to consult together about the case and
the defence [sic]").


45. 902 F.2d 244 (4th Cir. 1990) (applying joint defense privilege to protect docu-
ments shared between parent corporation and its subsidiary both before and after the
subsidiary was separately incorporated).
JOINT DEFENSE DOCTRINE

The joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.\(^{46}\)

The social benefits flowing from protecting the confidentiality of joint defense communications and promoting joint defense arrangements are confined to the litigation process. The benefits do not advance social values extrinsic to the litigation.\(^{47}\)

The formation of joint defense groups maximizes the strength of the defendant's case by dividing labor, testing the government's evidence, and preserving the adversary system of justice. In addition, joint defense groups minimize the waste of judicial time that results from the representation of uncoordinated defenses in the courtroom by defendants.

II. THE RISE OF THE JOINT DEFENSE PRIVILEGE

American protection for communications among co-defendants and their separately retained lawyers was recognized first in a criminal case\(^{48}\) over one hundred years ago. The case protected the confidentiality of oral communications between co-defendants in the presence of lawyers.\(^{49}\) It was next invoked in a civil case seventy years later.\(^{50}\) In this case, the doctrine protected a writing reflecting the client's statements to his own lawyer when that document was shared with the counsel separately representing co-defendants.\(^{51}\) In the 1960s, co-defendants resurrected their requests for the protection of joint defense communications with two Ninth Circuit criminal decisions.\(^{52}\) These

\(^{46}\) Id. at 249; see Continental Oil Co. v. United States, 330 F.2d 347, 348-49 (9th Cir. 1964) (exchanging memoranda made representation of respective clients "more effective" during the grand jury investigation and any consequent litigation). The exchange of information is made "for the limited and restricted purpose to assist in asserting their common claims." Id. at 350; see also John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers, 913 F.2d 544, 556 (8th Cir. 1990) (stating that when information is exchanged between co-defendants and their attorneys, the exchange is made for the limited purpose of assisting a common cause), cert. denied, 500 U.S. 905 (1991); United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir.) (stating that the "the [joint-defense] privilege protects pooling of information for any defense purpose common to the participating defendants"), cert. denied, 444 U.S. 833 (1979); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (per curiam) (holding that exchange of information is made for limited purpose of assisting a common cause).

\(^{47}\) This is in contrast to the social benefits extrinsic to the litigation that justify the privileged status of other protected communications, such as communications between spouses or between physician and patient.


\(^{49}\) Chahoon, 62 Va. at 836-44.

\(^{50}\) Schmitt v. Emery, 2 N.W.2d 413, 417 (Minn. 1942), overruled in part by Leer v. Chicago, 308 N.W.2d 305 (Minn. 1981).

\(^{51}\) Schmitt, 2 N.W.2d at 415.

\(^{52}\) Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965) (protecting co-defendants communications at pre-indictment meeting attended by co-defendants and their
two cases began the modern development of what has since been called "the joint defense privilege" or "common interest rule." Protection for the confidentiality of co-defendants' communications when each co-defendant retains a separate lawyer is relatively young among privileges when compared with the attorney-client privilege and the privilege against self-incrimination. One might view this protection as still in its formative stages. Perhaps because of judicial resistance to create something new, courts initially treated it as an extension of the attorney-client privilege.

In Chahoon v. Commonwealth an American court first recognized the joint defense privilege to exclude testimony offered by the defense at a criminal trial in Virginia. In Chahoon, three co-defendants were charged with conspiracy, each of whom retained his own lawyer. The court tried Chahoon separately from his alleged co-conspirators. In its direct case, the government called one of the co-conspirators to testify as a government witness against Chahoon. The cooperator testified to a conversation between Chahoon and him-

[53. See In re Grand Jury Subpoena, 406 F. Supp. 381, 387 (S.D.N.Y. 1975) (finding both Continental Oil and Hunydee instructive). The court noted:

[W]here there is consultation among several clients and their jointly retained counsel, allied in a common legal cause, it may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation, will give sufficient force to a subsequent claim to the privilege. Id.

In SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976), the privilege exited in communications between executives of two corporations concerning legal advice where they shared a common interest. Id. at 513-14. The court noted, however, that:

[A] client's sharing of its attorney's advice with a third party is not in confidence simply because the third party's lawyer thought that there 'might' be a challenge, which 'could' involve his client. Unless the interests of the parties are demonstrably common, as when potential defendants discuss grand jury questioning or intended pleas, the risk of shared exposure must at least be sufficiently substantial to have prompted the third party's lawyer to counsel his client regarding the prospective hazard.

Id. at 525 (citations omitted).

54. The privilege is also known as the common interest rule. See Weinstein & Berger, supra note 21, at § 503(b)(06) (1996).


56. 62 Va. (21 Gratt.) 822 (1871).

57. See id. at 841-42. Over 100 years ago, two English cases also recognized the joint defense privilege. See Rochefoucauld v. Boustead, 65 L.J.R. 794, 796 (Ch. 1896); Enthovern v. Cobb, 42 Eng. Rep. 1019, 1019-20 (Ch. 1852).


59. Id.
self in the presence of defense lawyers during a pretrial defense meeting. In rebuttal, Chahoon called the lawyer of the witness to testify to that same conversation. Chahoon maintained the witness had inaccurately recounted the conversation in his testimony and sought to use the lawyer to prove this. Even though the co-defendant had already testified to this conversation as a government witness, the lawyer declined to answer and asserted the confidentiality of the lawyer-client conference. The Chahoon court upheld the lawyer's refusal to testify. The court ruled that there should be no distinction between the confidentiality of statements made at a pretrial defense conference attended by multiple co-defendants represented by separately retained lawyers and the confidentiality of statements made at a similar conference where a single lawyer represented multiple clients. The court ruled that in the case at bar, the privilege protecting the confidentiality of communications between lawyers and clients extended to communications between co-defendants in the presence of their lawyers, for the purpose of facilitating their defense to common charges. The court extended protection to such communications because:

The parties were jointly indicted for a conspiracy to commit a particular crime, and severally indicted for forging and uttering the same paper. They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication.

The Chahoon court reasoned that for purposes of confidentiality, there was no distinction between the retention of a single lawyer to represent multiple co-defendants and the retention of separate law-

60. Id. at 835-36.
61. Id. at 836.
62. Id. Chahoon, on its facts, seems almost indefensible. The conversation at issue in Chahoon had occurred in the presence of the three alleged co-defendants and two of their defense lawyers. Id. at 835. A strong argument could have been made that the objecting party waived the attorney-client privilege when he testified as a prosecution witness. When Chahoon, who was tried separately from his co-defendants, called the prosecution witness' lawyer to testify about that same conversation, the court should have disallowed the claim of attorney-client privilege and permitted the testimony. The government witness had waived the confidentiality of the conversation about which Chahoon sought to elicit testimony. The court required the further consent of the third co-defendant who was not on trial. Id. at 840-41. The waiver of the privilege as to the conversation in question seems obvious because the witness testified about it and the third co-defendant failed to object. Id. Thus one wonders whether the protection for joint defense communications may have been born out of judicial antipathy towards the defense; the protection first arose to stop a defendant on trial from using information from a joint defense conference in his own defense when the prosecution used part of the very same conversation against the defendant.
63. Id. at 839-40.
64. Id. at 841.
65. Id.
66. Id.
yers. Both instances were entitled to have the confidentiality of co-defendants' communications in furtherance of a common defense effort protected from disclosure without consent. The court further reasoned that defendants in criminal cases had a right to choose whether to be represented jointly or separately by counsel.

The Chahoon court's protection of communications in pursuit of a common defense to common criminal charges when defendants retain separate counsel remains sound and is more compelling given today's strong judicial preference that co-defendants in criminal cases retain separate lawyers. Co-defendants, represented jointly or separately, need to communicate together and with their lawyers to plan a common defense strategy. The Chahoon court held that communications involving separately retained lawyers and their clients allied in a common legal matter should be protected because the attorney-client privilege protected the communications when one lawyer represented several clients. Relying on the attorney-client privilege model, the

67. Id.

68. See id. Today, co-defendants do not have an unqualified right to retain a single lawyer to represent them. See Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978). A court can override the choice of multiple co-defendants to be represented by the same lawyer and demand that each co-defendant retain separate counsel. Wheat v. United States, 486 U.S. 153 (1988). In Wheat, the court explained that while the Sixth Amendment guarantees the right to select and be represented by the attorney of one's choice "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Id. at 159. Further, the Court recognized that multiple representation of criminal defendants presents "special dangers" because of the potential conflict of interest. Id. at 159-60. Hence, the Court concluded that "where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver [of the right of conflict-free counsel], and insist that the defendants be separately represented." Id. at 162.

69. "[I]t was natural and reasonable, if not necessary, that these parties, thus charged with the same crimes, should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know, and to make all necessary arrangements for the defense." Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 839 (1871).

70. See Wheat, 486 U.S. at 159-61.

71. Chahoon, 62 Va. at 841. Courts prefer co-defendants in criminal cases to retain separate representation for the prophylactic purpose of avoiding actual conflicts of interest. Wheat, 486 U.S. at 160-62. The Chahoon court implicitly recognized the needs of co-defendants who retain separate lawyers to confer together in furtherance of their common defense. Chahoon, 62 Va. at 841. Certainly this need is not decreased when multiple co-defendants retain common counsel. The law's preference for separate representation of co-defendants in criminal cases creates a judicially imposed artificial vacuum in the knowledge of the separately retained lawyers. This can only be cured by allowing unimpeded communications between the separately retained lawyers and the co-defendants when the possible pursuit of a joint defense is in their mutual interest. Unimpeded communication requires the guarantee of protection from disclosure to an adversary who would otherwise seek to use the communications against their makers. Hence, protection in the nature of a confidentiality doctrine is appropriate.

In order to fill the artificial vacuum of knowledge and encourage communications in pursuit of a joint defense, it is necessary to provide protection from disclosure to
The next case to consider whether pursuit of a matter of common legal interest warranted protecting the confidentiality of communications between separately retained lawyers was in a civil matter. In *Schmitt v. Emery*, the court held that the confidentiality requirement of the attorney-client privilege was not lost when the lawyer representing two co-defendants shared a client interview statement with a separately retained lawyer representing two other co-defendants. The purpose of the exchange was to combine defense efforts to establish the privileged nature of the document because all of the co-defendants sought to exclude it from evidence at trial and the court had preliminarily ruled it was admissible. The *Schmitt* court reasoned that the document did not lose any privileged status when shared with counsel for co-defendants because it had been disclosed not for the purpose of publishing its contents—but for the mutual purpose of establishing the document’s inadmissibility. The information was given “in confidence, for the limited and restricted purpose to assist in asserting their common claims.” The court ruled that the recipients of the document acquired a limited right to use the statement to establish its privileged nature and exclude the statement from the trial evidence.

In matters of first impression, the *Chahoon* and *Schmitt* courts recognized the need to protect the confidentiality of client statements made in the course of a common defense, among separately retained lawyers for co-defendants in civil and criminal matters. Both courts relied, in part, on the model of the attorney-client relationship and applied protection analogous to the attorney-client privilege. These necessary protections can be achieved by means other than application of the attorney-client privilege to joint defense communications, even though the *Chahoon* court did not choose that path. This more narrowly-tailored protection is discussed below. See infra part IV. In other words, the *Chahoon* court could have reached the same result by recognizing a separate doctrine to protect the confidentiality of communications when multiple co-defendants retain separate lawyers but choose to pursue a common defense. The court’s drawing upon the attorney-client privilege may have been an analogy or an extension of that privilege. The case is unclear as to which route the court took.

72. 62 Va. at 842. The defense could have argued that the third co-defendant’s failure to object to the first testimony about the joint defense communication constituted a waiver, and no further consent was needed.

73. 2 N.W.2d 413 (Minn. 1942), overruled in part by Leer v. Chicago, Milwaukee, St. P. & Pac. Ry., 308 N.W.2d 305 (Minn. 1981).

74. Id. at 416-17.

75. Id.

76. Id.

77. Id. at 417.

78. Id. The right was limited to the purpose for which it was transmitted by the information giver. Id.
decisions are important because they afford protection for confidential exchanges between co-parties mounting a common defense.\textsuperscript{79}

As the privilege has developed, courts have not looked back to the soundness of the original doctrinal rationale for the protection. Instead, they have forged ahead and consistently reaffirmed the confidential status of communications occurring between joint defense members and relied on the attorney-client privilege as support for the protection.\textsuperscript{80} Courts reason that “[t]he assurance of confidentiality is as important and appropriate in a joint defense of defendants whose attorneys are separately retained as it is where co-defendants have engaged common counsel.”\textsuperscript{81} As the privilege evolved, it came to be recognized as the “joint defense” or “common interest” exception to the attorney-client privilege.\textsuperscript{82} Ordinarily, a waiver of the attorney-client privilege results if communications between lawyer and client are shared with a third party.\textsuperscript{83} Joint defense communications are an

\textsuperscript{79} In fact, although the attorney-client privilege was recognized, neither \textit{Chahoon} nor \textit{Schmitt} explicitly declared this type of conference within the attorney-client privilege. They merely recognized the appropriateness of protecting the communication. \textit{Id.}; Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 840-41 (1871). At that time in the development of the protection for communications between co-parties and their separate counsel, no court would have foreseen the problems that invoking the rationale of the attorney-client privilege would create. In criminal prosecutions, these risks could include the possibility of attorney disqualification when the prosecution induces a co-defendant to become a government witness.

In civil cases, co-parties may also settle their claims and switch sides. The liberal discovery rules in civil cases already made those parties witnesses if their common adversary sought discovery. A civil settlement could potentially require a party to disclose greater information—i.e., privileged information—than available through discovery. Nonetheless, the confidentiality of joint defense communications would remain intact unless all participants agree to waive. Therefore, a single party “switching sides” in a civil case is unable to disclose privileged joint defense communications. Of course, the risk of unauthorized disclosure exists. It is more likely that a lawyer will “switch sides” and represent a new client wishing to sue a former member of a joint defense group in which that lawyer once represented another member of the group. \textit{Accord} Turner v. Firestone Tire & Rubber Co., 896 F. Supp. 651, 654 (E.D. Tex. 1995) (involving a defense motion to disqualify plaintiff’s counsel on the ground that counsel had formerly represented defendant as a joint defense group member).

\textsuperscript{80} \textit{See}, e.g., United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) (protecting communications made to an accountant aiding attorneys conducting a joint defense); Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) (protecting pre-indictment oral communication between prospective defendants); Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964) (protecting pre-indictment exchanges of memoranda of witness interviews during a Grand Jury investigation between counsel for co-defendants).


\textsuperscript{82} \textit{E.g.}, \textit{In re LTV Sec. Litig.}, 89 F.R.D. 595, 604 (N.D. Tex. 1981) (applying joint defense privilege to civil defendants where liability could arise from separate acts or omissions and where cross claims might be asserted); \textit{Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.}, 559 F.2d 250, 253 (5th Cir. 1977) (holding that an attorney breaches his fiduciary duty if in representation of another client he uses information obtained in a joint defense exchange to the detriment of one of the co-defendants).

\textsuperscript{83} \textit{In re LTV Sec. Litig.}, 89 F.R.D. at 603-04.
exception because another lawyer or client member of the joint defense group is not treated as a third party for purposes of waiver.\textsuperscript{84}

Generally, courts hold that to establish the joint defense privilege, the parties must show that the communications were: (1) intended to be kept confidential; (2) made in pursuit of a joint legal effort; and (3) intended to advance the common legal interests of the co-parties.\textsuperscript{85} The joint defense doctrine requires that co-defendants pursue some common interest.\textsuperscript{86} Courts recognize that no policy of the attorney-client privilege is injured by extending protection to confidential communications made in pursuit of a joint defense.\textsuperscript{87} The joint defense privilege is thus viewed as an extension of the attorney-client privilege applied to independently represented co-defendants.\textsuperscript{88}

Courts have interpreted broadly the joint defense privilege. It protects confidential communications between all co-parties, not just co-defendants, who share interests in common.\textsuperscript{89} A mistaken belief that the parties have agreed to pursue a joint defense does not give rise to a joint defense privilege.\textsuperscript{90} Additionally, the presence of a stranger

\textsuperscript{84.} See Capra, \textit{When Parties Share Interests}, supra note 3, at 1. There is no privilege, however, for communications with another party's lawyer where the interests of the parties are completely adverse and were not made with any expectations of confidentiality. See Weinstein \& Berger, supra note 21, at ¶ 503(b)(6), at 100-01 ("Only if there is no common interest and the interests of the parties are totally antagonistic will the privilege be denied."); see also Government of Virgin Is. v. Joseph, 685 F.2d 857, 862 (3d Cir. 1982) (denying privilege for statements made to an attorney whose client's interests were antagonistic to the declarant); United States v. Cariello, 536 F. Supp. 698, 702 (D.N.J. 1982) (denying privilege in absence of evidence that statement was made in furtherance of a joint defense strategy); People v. Osorio, 549 N.E.2d 1183, 1186-87 (N.Y. 1989) (denying privilege where interests of co-defendants conflicted).

\textsuperscript{85.} See United States v. Bay State Ambulance \& Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989); \textit{In re Bevill, Bresler \& Schulman Asset Management Corp.}, 805 F.2d 120, 126 (3d Cir. 1986); \textit{In re LTV Sec. Litig.}, 89 F.R.D. at 604.

\textsuperscript{86.} The joint defense privilege also should apply to communications made to ascertain whether a common interest exists, and whether a joint defense is in the best interests of the individual co-defendants. Invoking the joint defense privilege requires: (1) proof that the communications between co-parties and their individually retained lawyers were intended to be confidential; (2) concerned matters of community interest; and (3) made pursuant to an agreement to facilitate legal representation in matters of common interest. \textit{E.g., In re LTV Sec. Litig.}, 89 F.R.D. at 604.

\textsuperscript{87.} \textit{Id.; see also In re Grand Jury Subpoena}, 406 F. Supp. 381, 388 (S.D.N.Y. 1975) (stating that the joint defense privilege is consistent with the policy underlying the attorney-client privilege).

\textsuperscript{88.} United States \textit{v. Schwimmer}, 892 F.2d 237, 243 (2d Cir. 1989).

\textsuperscript{89.} \textit{In re Grand Jury Subpoenas}, 902 F.2d 244, 249 (4th Cir. 1990) (stating joint defense privilege applies whether "action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal"); Schachar \textit{v. American Academy of Ophthalmology}, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (recognizing existence of privilege for plaintiffs' attorneys facing a common litigation adversary in separate antitrust law suits); \textit{cf. Visual Scene, Inc. v. Pilkington Bros.}, 508 So. 2d 437, 441-42 (Fla. Dist. Ct. App. 1987) (upholding privilege between plaintiff and defendants who shared common interests).

during joint defense communications will destroy the confidentiality required by the rule and eliminate its protection.91

Parties need not be aligned on the same side of the litigation for the joint defense privilege to apply. In one expansive application of the joint defense privilege, a court protected the confidentiality of communications between adversaries when a plaintiff and one of the defendants were pursuing a matter of common legal interest in the litigation.92 The privilege applies to both civil and criminal cases.93 The protection can be claimed whether litigation is pending or reasonably anticipated.94 The privilege also has been found to extend to legal advice shared with no litigation in sight.95 The privilege does not extend, however, to communications among co-defendants in the absence of their lawyers.96

The communication may come within the ambit of the joint defense privilege when a client of one lawyer communicates directly with a co-defendant's lawyer or a co-defendant's lawyer's agent, such as an investigator or an accountant assisting the trial preparation.97 Some courts have opined that the attorney who undertakes to serve his client's co-defendants for a limited purpose becomes the co-defendant's lawyer for that limited purpose.98 Other decisions seem to eschew the

92. Visual Scene, 508 So. 2d at 443. The court applied the joint defense privilege to protect the confidentiality of communications between VSI and Metro from disclosure to co-defendants where VSI and Metro were aligned as plaintiff and defendant in the litigation but had pursued a matter of common legal interest, namely a joint theory of liability regarding another defendant.
93. E.g., Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) (applying privilege to communications made where grand jury investigation was pending); Davis v. Costa-Gavras, 380 F. Supp. 1082, 1098-99 (S.D.N.Y. 1984) (upholding privilege for communications made before the production of a movie where the charge of libel was anticipated).
94. SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 514 (D. Conn. 1976) ("Whether the legal advice was focused on pending litigation or on developing a patent program that would afford maximum protection, the privilege should not be denied when the common interest is clear.").
95. See id. Some courts, however, reject the application of the joint defense privilege when there is no actual or potential likelihood of litigation or strong possibility thereof. See, e.g., In re Sealed Case, 29 F.3d 715, 718 n.3 (D.C. Cir. 1994); Polycast Tech. Corp. v. Uniroyal, Inc. 125 F.R.D. 47, 50 (S.D.N.Y. 1989); cf. In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986) (rejecting joint defense privilege).
97. E.g., United States v. McPartlin, 395 F.2d 1321, 1337 (7th Cir.) (recognizing privilege for communication made to investigator assisting the lawyer for another co-defendant), cert. denied, 444 U.S. 833 (1979); United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) (extending privilege to confidential communications with an accountant assisting attorneys in a joint defense effort).
98. E.g., McPartlin, 395 F.2d at 1337.
creation of an attorney-client relationship arising from joint defense agreement.  

When one client member of a joint defense group commences cooperation with the prosecution, a duty arises to withdraw from the group.  

The government is barred from allowing the party who defected from the joint defense group to reveal joint defense communications revealed to him while part of the joint defense effort.  

Most courts hold that the consent of all members is necessary for a valid waiver to occur.  

III.  AN OVERVIEW OF THE PROBLEMS CAUSED BY CONSTRUING THE JOINT DEFENSE PRIVILEGE AS PART OF THE ATTORNEY-CLIENT PRIVILEGE  

The joint defense privilege has long been conceptualized as an extension of the attorney-client privilege. The attorney who undertakes to serve the interests of his client's co-defendants is deemed to become the co-defendants' lawyer for that limited purpose.  

Consequently, communications among joint defense client members and the lawyers of co-defendants have been treated as attorney-client commun—


101. The co-defendants proceeding to trial whose joint defense communications are revealed to the prosecution by a defecting member would suffer injury to the Sixth Amendment right to counsel. See United States v. Aulicino, 44 F.3d 1102, 1117 (2d Cir. 1995) (finding insufficient evidence of prejudice when cooperator attended a joint defense meeting after negotiations to become a cooperators witness began because government built a "chinese wall" to avoid learning the defense strategy discussed at that meeting).

102. E.g., In re Grand Jury Subpoenas, 902 F.2d 244, 248 (4th Cir. 1990); see Capra, When Parties Share Interests, supra note 3, at 28. But see Western Fuel Ass'n v. Burlington N. R.R., 102 F.R.D. 201, 203 (D. Wyo. 1984) (finding that a party participating in joint defense communications may waive the privilege with respect to its own communications to the joint defense group).

103. See supra text accompanying note 98. The attorney-client privilege provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation" Model Rules of Professional Conduct Rule 1.6 (1995) [hereinafter Model Rules].

The attorney-client privilege has been extended to include the joint defense privilege. See infra notes 134-39 and accompanying text; see also Weinstein & Berger, supra note 21, ¶ 503(b)(06) (stating that attorney client privilege exists in cases where joint clients share a common interest); Waller v. Financial Corp. of Am., 828 F.2d 579, 583 n.7 (9th Cir. 1987).
nations and cloaked with the virtually impenetrable protection afforded attorney-client communications.104

The situation arises with foreseeable frequency in criminal cases that a member of the joint defense group changes sides to become a prosecution witness.105 The government completely controls this event because of its power to induce voluntary cooperation by immunizing a defendant or tendering a favorable plea bargain. The prosecutor controls the timing of this defection, which might occur as early as the grand jury investigation stage or as late as the eve of trial or even during trial.106 Given the present construction of the joint defense privilege, aggressive prosecutors have an added incentive to convert one of the members of the joint defense group into a government witness and to do it as late as possible. By transforming a member of the joint defense group into a prosecution witness, the Government gains much more than its legitimate right to this witness’ evidence. The government now has a powerful tactical advantage over the defense because it holds a tool to urge the disqualification of the lawyers representing the co-defendants proceeding to trial.

If the defector’s statements to the joint defense groups are attorney-client communications, whenever the prosecution transmogrifies a joint defense group member into a testifying government witness, the lawyers defending the remaining co-defendants face an ethical dilemma. If they must cross-examine that government witness at the trial, the attorney-client privilege and rules of professional conduct seem to bar the attorney from using the defector’s confidential attorney-client communications in cross-examination.107 The lawyer, however, owes his client standing trial a duty of loyalty, encompassing a duty of rigorous cross-examination of witnesses testifying against the client. If the lawyer cannot cross-examine the turncoat with information the lawyer has received, an actual conflict of interest arises between the duty of confidentiality owed the witness and the duty of undivided loyalty owed the client standing trial. This actual conflict of interest implicates the defendant’s constitutional guarantee to effective assistance of counsel. To avoid this impairment of the defense, at the urging of prosecutors, courts have considered disqualifying the

105. For a discussion of this problem, see Ethical Implications, supra note 6, at 115.
106. During the middle the World Trade Center bombing case trial in the summer of 1995, the government induced one of the co-defendants who was a party to the joint defense group to switch sides to become a government witness. Bomb Trial Defense Faults Judge on Plea, Wash. Post, Feb. 8, 1995, at A8.
107. See Ethical Implications, supra note 6, at 123. Canon 4 of the Model Code requires a client’s communications be confidentially maintained. Model Code of Professional Responsibility Canon 4 (1979) [hereinafter Model Code].
lawyer from continuing to represent the client who is proceeding to trial.\(^{108}\)

### A. Ethical Issues Posed by the Present Construction

Several times courts have confronted instances where a lawyer representing one member of a joint defense arrangement at trial must cross-examine a member who withdrew from the joint defense group to become a cooperating government witness.\(^{109}\) These courts have assumed that grounds to disqualify trial counsel exist when this event occurs.

In *United States v. Anderson*,\(^{110}\) Anderson and other employees were charged, *inter alia*, with criminal violations of conspiracy and mail fraud laws. The various co-defendants retained separate lawyers to represent them. They entered into a joint defense arrangement that required all information exchanged to be confidential within the joint defense group.\(^{111}\) Some members of the joint defense group eventually withdrew and were expected to testify as government witnesses at Anderson's trial.\(^{112}\) The prosecutor moved to disqualify Anderson's lawyer on the ground that the lawyer had a conflict of interest arising from his inability to cross-examine the defectors with the information obtained from them in the course of the joint defense arrangement.\(^{113}\) The prosecutor argued that the lawyer's duty of confidentiality owed to the defecting witness conflicted with the duty of loyalty owed his client at trial.

The *Anderson* court held a disqualification hearing and concluded that Anderson's lawyer did not have a conflict of interest because he possessed little if any confidential communications from the defectors who would be adverse trial witnesses.\(^{114}\) The *Anderson* court found that Anderson could waive any potential conflicts "based on the fact that his counsel may not use or seek to elicit from witnesses information obtained solely under the joint defense doctrine."\(^{115}\)

In *United States v. McDade*,\(^{116}\) defendant, Congressman McDade, and his lawyer entered into a joint defense agreement with Mr. Wittig, another codefendant, and his lawyer. The joint defense arrangement

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111. Id. at 231.
112. Id. at 231-32.
113. Id.
114. Id. at 233.
115. Id.
lasted two years, during that time, Wittig shared information with McDade's lawyer regarding the grand jury investigation. Wittig neither sought not received advice from McDade's lawyer regarding the grand jury investigation. The McDade court found that the joint defense communications were privileged and that McDade's lawyer owed Wittig a duty of confidentiality. Wittig was indicted, pled guilty and agreed to cooperate against McDade. The prosecutors moved to disqualify McDade's lawyer because of divided loyalties between the duty of confidentiality owed to Wittig and the duty of vigorous representation owed to McDade. The defector, Wittig, did not join in the motion.

Although finding McDade's representation "short of being conflict-free," the McDade court denied the motion to disqualify for several reasons. First, recognizing the Sixth Amendment concerns that McDade be afforded "full, constitutional, due process representation," the court ruled that it would "appear something of a perverse paradox . . . to drive a cold chisel in between client and counsel under the constitutional rubric of affording him effective counsel." The court acknowledged that McDade's defense lawyer was capable and very conversant with the facts of the particular case. The court also stressed the great confidence McDade had in his lawyers and McDade's opinion that to lose his long-standing lawyer would cause him to suffer a "diminution in the quality of his representation."

The court further reasoned that in allowing McDade to waive his right to cross-examine Wittig based on confidential joint defense communications, the defense "in effect, forgoes nothing" because no lawyer could cross-examine Wittig based on his privileged communications. Therefore, the court did not find that the agree-

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117. Id. at *3. This case is complicated by the fact that before the joint defense arrangement, McDade's lawyers also represented Wittig. But the court found that their "actual representation" of Wittig, as distinct from the joint defense agreement was "limited in duration and scope." Id. at *5 n.1.
118. Id. at *3.
119. Id. at *5 n.1.
120. Id. at *3.
121. Id. at *6.
122. Id. at *5.
123. Id. at *13.
124. The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. A critical aspect of preparing a defense to a criminal case is selecting the person who, as the defendant's lawyer, will serve as the defendant's assistant and representative. Wheat v. United States, 486 U.S. 153, 166 (1988) (Marshall, J., dissenting).
126. Id. at *7.
127. Id.
128. Id. at *8.
ment not to cross-examine erected "any great barrier . . . to the full, robust quest for truth that a tribunal of justice requires."

The third reason the court refused to disqualify McDade's lawyer was because Wittig, the witness, did not join in the government's disqualification motion. The witness demanded only that his communications be kept confidential. McDade agreed to this demand. For those reasons, the conflict of interest the McDade court believed arose did not require that McDade's lawyer be disqualified.

To the extent communications are shared on matters of community interest, the lawyer for one party is deemed the lawyer for other parties who have communicated statements to such attorney for the limited purpose of pooling information. Conceived in this fashion, the ethical rules governing an attorney with multiple concurrent clients in a single proceeding inherently attach. These rules impose duties running not only to the client who retained the lawyer but to all members of the joint defense group who have made confidential statements to a lawyer for a co-defendant.

129. Id. at *8-9.
130. Id. at *9.
131. Id.
132. Id. at *12. In another case involving a joint defense arrangement the court also thought that the need to cross examine a defector from the joint defense group might create a potential conflict of interest that was "very attenuated." United States v. Bicostal Corp., No. 92-CR-261, 1992 WL 693384, at *6 (N.D.N.Y. Sept. 28, 1992). In Bicostal, the court refused to allow discovery into the joint defense agreement on grounds that it may intrude on the privileged relationship. Id.
134. See Model Rules, supra note 103, Rules 1.6, 1.7, 1.9(a); see infra note 136-38 and accompanying text.
These ethical duties of loyalty\textsuperscript{136} and confidentiality\textsuperscript{137} continue after the professional relationship has ended.\textsuperscript{138} Because each lawyer seemingly owes these duties to each of the multiple co-parties of the original client, as the protection for joint defense communications is now construed, ethical conflict may arise if the lawyer must cross-examine a government witness who was a former member of the joint defense group.\textsuperscript{139} Ethical questions are implicated if one co-defendant on trial wishes to cross-examine a government witness using the joint defense communication of another co-defendant.\textsuperscript{140} Ethical questions can also arise when a lawyer in a subsequent proceeding represents a client with interests adverse to a former member of a joint defense group, who made confidential statements to the law-

\textsuperscript{136} Model Rules 1.7 and 1.9 define the lawyer's duty of loyalty. See Model Rules, supra note 103, Rules 1.7, 1.9. Rule 1.9(a) of the Model Rules provides that:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

\textit{Id.} Rule 1.9(a).

Rule 1.9 (c) provides:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

\textit{Id.} Rule 1.9(c).

137. Rule 1.6 of the Model Rules provides that:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.


at least if the two proceedings are substantially related.\textsuperscript{142} The presence at a joint defense group meeting of a lawyer or client when cooperation negotiations with the government have begun also raises ethical dilemmas.\textsuperscript{143}

Courts addressing these questions have assumed that the confidentiality of the joint defense privilege operates to preclude lawyers from using joint defense communications to cross-examine.\textsuperscript{144} This construction of the privilege imposes limits on the lawyer's cross-examination to avoid disclosure of the communications given in pursuit of joint defense efforts.\textsuperscript{145} Courts have also assumed that disqualification of a lawyer may be appropriate or necessary to protect the confidentiality of statements made in the course of a joint defense arrangement.\textsuperscript{146} Thus, the ethical issues arising when one member of the joint defense group resigns to become a government cooperator threaten to disqualify lawyers for those defendants proceeding to trial. Even when no joint defense group member cooperates with the gov-


\textsuperscript{142} In Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir. 1977), a civil matter, the court disqualified a lawyer who represented a party with interests adverse to another party who in a prior litigation had been in a joint defense arrangement with the lawyer's present client. \textit{Id.} at 252-53. The court applied the substantial relationship test. \textit{Id.} Nonetheless, it is not certain that federal courts will apply the substantial relationship test in criminal cases to disqualify lawyers from representing clients where a government witness formerly was a co-defendant and belonged to the joint defense group.

For example, in United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975), the court refused to apply civil disqualification standards in a criminal case because of the competing Sixth Amendment right to counsel. \textit{Id.} at 592-93. The court instead balanced the witness' interest in confidentiality against the need for the lawyer to continue in the representation. \textit{Id.}

\textsuperscript{143} United States v. Aulicino, 44 F.3d 1102, 1117 (2d Cir. 1995) (refusing to recognize a Sixth Amendment violation when prosecutors had begun cooperation negotiations with a member of the joint defense group who attended a further joint defense meeting, and holding that it was the burden of the defendant to allege "specific facts" of "communication . . . to the prosecutor and prejudice"); see FDIC v. Cheng, 1992 Fed. Sec. L. Rep. (CCH) \textsuperscript{144} \textit{97,211, at 94,896-98} (N.D. Tex. 1992).


\textsuperscript{145} \textit{See} McPartlin, 595 F.2d at 1336-37; \textit{McDade}, 1992 U.S. Dist. LEXIS 11447, at *8.

\textsuperscript{146} Wilson P. Abraham, 559 F.2d at 253 (remanding issue of disqualifying lawyer in civil case); \textit{see} \textit{McDade}, 1992 U.S. Dist. LEXIS 11447, at *11 (refusing to disqualify lawyer where witness did not seek disqualification, and only the prosecutor did); \textit{Anderson}, 790 F. Supp. at 232 (refusing to disqualify lawyer where the amount of confidential information shared was slight).
ernment, one co-defendant, in his defense, may wish to offer at trial a
statement made by another member of the joint defense group who
refuses to consent to its disclosure. An ethical issue is again raised
as to the scope of a lawyer’s duty of confidentiality owed the maker of
the confidential statement.

Some courts have asserted that a joint defense arrangement creates
legal and ethical duties like any other attorney-client relationship run-
ing from the lawyer of co-defendant A to co-defendants B and C
who participate in the joint defense arrangement. Other courts,
however, dispute this and recognize that a joint defense arrangement
itself creates no ethical duties whatsoever to any client member of the
group except the lawyer’s immediate client. These courts further con-
clude that no other co-defendant becomes the client of a lawyer just
because they share a joint defense arrangement. In that instance,
when a member of the joint defense group becomes a government
witness, the lawyers would be free from any conflict of interest in the
representation of his client and no ground for disqualification exists.

If courts seek guidance from the American Bar Association’s Model
Rules of Professional Conduct an inspection of the language of the
rules demonstrates why the rules do not apply to the situation of a
joint defense arrangement. Rules 1.7 and 1.9 define the lawyer’s duty
of loyalty. Rule 1.7 (a) bars a lawyer from simultaneously represent-
ing two clients whose interests are directly adverse. This rule
should be inapplicable. A member of a joint defense group should not
by virtue of that status alone become the client of his co-defendant’s
separate lawyer. Those courts that have rhetorically declared a law-

147. McPartlin, 595 F.2d at 1336-37 (disallowing use of joint defense communica-
tion to cross-examine government cooperator where the maker of the statement did
not consent).

148. E.g., id. at 1336-37; Wilson P. Abraham, 559 F.2d at 253; McDade, 1992 U.S.
Dist LEXIS 11447 at *11; Anderson, 790 F. Supp. at 232-33. Others, however, have
recognized that a lawyer’s participation in a joint defense arrangement should not
automatically create ethical duties or legal responsibilities owing to the co-defendants
of his client. See Brown v. Doe, 2 F.3d 1236, 1247 (2d Cir. 1993), cert. denied, 510 U.S.
1125 (1994); Turner v. Firestone Tire & Rubber Co., 896 F. Supp. 651, 653 n.6 (E.D.
Tex. 1995) (“[M]embers of the Joint Defense Group . . . are not clients” for purposes
of Texas Disciplinary Rule of Professional Conduct 1.06(c)); Matthew D. Forsgren,
Note, The Outer Edge of the Envelope: Disqualification of White Collar Criminal De-
fense Attorneys Under the Joint Defense Doctrine, 78 Minn. L. Rev. 1219, 1242-43
(1994) (“[T]he joint defense attorneys do not owe their absolute fidelity to joint defense
members other than their own clients . . .” (footnote omitted)).

149. Brown, 2 F.3d at 1246-47; Turner, 896 F. Supp. at 653.

150. Model Rules, supra note 103.

151. Id. Rule 1.7(a).

152. Turner, 896 F. Supp. at 653 n.6. In that civil case, the court ruled that members
of the joint defense group were not a client for Texas Disciplinary Rule of Profes-
sional Conduct 1.6(c) purposes, so their consent was not necessary under the rule.
Id. at 654; accord Brown, 2 F.3d at 1247 (stating attorney was “free of any legal or
ethical obligation to any defendant” other than her client). But see United States v.
McPartlin, 595 F.2d 1321, 1337 (7th Cir.) (“The attorney who thus undertakes to serve
yer in a joint defense arrangement to be the lawyer for all co-defendants have engaged more in hyperbole than in thoughtful analysis of the consequences that follow if that were really to be the case. The Second Circuit employed a more restrained approach in *Brown v. Doe*. In *Brown*, the court recognized that in a joint defense arrangement, no ethical duty of loyalty runs from a lawyer representing one co-defendant to the group, to other co-defendants, or to any one other than the lawyer's client. This approach reflects a greater sensitivity to the actual dynamics of the joint defense arrangement. Under *Brown's* reasoning, each lawyer in a joint defense arrangement has only one client to represent. The attorney owes all ethical duties to that single client.

Model Rule 1.7(b) bars an attorney from representing a client when obligations to another client or third person would be materially limited by the challenged representation. Model Rule 1.7(b) should again be inapplicable because, a member of the joint defense group is not the client and never was a client of the lawyer for his co-defendant. He is, of course, a third person, but whether obligations to him would be materially limited by the lawyer's continued representation of his client depends on how courts define the lawyer's duty of confidentiality respecting a joint defense communication. Whatever the scope of the lawyer's obligation to the defecting member of the joint defense group, it does not independently arise from the Rules of Professional Conduct. The scope of the duty of confidentiality should arise from the scope of the joint defense privilege rather than from an imputed attorney-client relationship. The rule of construction governing communications given pursuant to a joint defense arrangement proposed by this Article does not contemplate absolute confidentiality. Under the construction proposed by this Article, the obligation of confidentiality owed to the government witness would not stop the lawyer from using the information in furtherance of the representation of his client. Model Rule 1.7(b) itself would pose no additional ethical obstacle.

Rule 1.9(a) forbids a lawyer from representing someone in the same or a substantially related suit whose interests are materially adverse to a former client. Again, the joint defense member turned govern-

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153. McPartlin, 595 F.2d at 1337.
154. 2 F.3d 1236 (2d Cir. 1993).
155. Id. at 1247.
156. Model Rules, supra note 103, Rule 1.7(b).
157. See infra part IV (suggesting that courts redefine the extent of confidentiality afforded communications given pursuant to a joint defense arrangement).
158. See infra part IV.
159. Model Rules, supra note 103, Rule 1.9(a).
ment witness is not a former client.\textsuperscript{160} In addition, it cannot be said that a government witness has interests materially adverse to the interests of the client who is on trial. The government witness has no interest at stake in the trial of his former co-defendant; he is not literally in an adverse position\textsuperscript{161} \textit{vis a vis} the defendant on trial, despite the fact that his truthful testimony may be damning to the legal position of the defendant on trial.

Rule 1.6 of the Model Rule dictates the lawyer's duty of confidentiality.\textsuperscript{162} It forbids, except in limited circumstances, a lawyer to disclose information relating to the representation of a client without the client's consent.\textsuperscript{163} Again, the former joint defense member turned government witness never was a client.\textsuperscript{164} Any duty of confidentiality owed to him is not the product of Rule 1.6, but derives from the scope of protection to be given to communications in pursuit of a joint defense. The breadth of confidentiality owed is the present question. This Article demonstrates that cross-examination of the government witness should not exclude the statements made by the witness to the joint defense group.\textsuperscript{165}

\textsuperscript{160} Turner v. Firestone Tire & Rubber Co., 896 F. Supp. 651, 653 (E.D. Tex. 1995) (holding that joint defense group member is not a client for purposes of Texas Disciplinary Rule of Professional Conduct 1.06); see Brown v. Doe, 2 F.3d 1236, 1247 (2d Cir. 1993) (holding that lawyer of one co-defendant owes the other co-defendants, members of joint defense groups, no ethical duties).

\textsuperscript{161} See In re Grand Jury Subpoena, 406 F. Supp. 381, 393-94 (S.D.N.Y. 1975). Even if a member of a joint defense group has potential claims against another member, they will not be adversaries until a lawsuit is commenced. The fact that one member of the joint defense group becomes a government witness does not make him an adversary of the defendant on trial. Id. The court in In re Grand Jury Subpoena held that ICC's potential claims against Vesco, in existence at the time of their joint defense meeting, and ICC's filing of a lawsuit against Vesco did not make ICC and Vesco adversaries in the criminal case. There was not "justification for requiring the disclosure of a former co-defendant's confidences for use in a third party proceeding," Id. at 394; accord State v. Archuleta, 217 P. 619, 621 (N.M. 1923). Archuleta involved an attempt to impeach a government witness who testified against several defendants in a perjury trial. On a previous occasion, the witness and the defendants jointly succeeded in defending against a murder charge. The defendants were then indicted for committing perjury at the murder trial. Id. At the perjury trial, the co-defendants tried to impeach the government witness with statements he made to his lawyer and co-defendants during the prior joint defense effort. Id. at 620-21. The court rejected the use of the witness's statement because the attorney-client privilege remained intact unless the parties became adversaries: "The witness under cross-examination ... is in no sense a party to the proceeding ... Of course, in a broad sense, a controversy had arisen between the witness and the appellants as to the truth in regard to the murder with which all were jointly charged." Id. at 621. Here, the interest of the parties to the privilege was not adverse even though the witness testified against his former co-defendants.

\textsuperscript{162} Model Rules, supra note 133, Rule 1.6.

\textsuperscript{163} Id.

\textsuperscript{164} See Brown, 2 F.3d at 1247; Turner, 896 F. Supp. at 653.

\textsuperscript{165} See supra text accompanying notes 139-47.
The American Bar Association Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee"),166 has rendered an opinion in another context concerning the ethical obligations of an attorney who has represented a client who participated in a joint defense arrangement in a civil proceeding. The following hypothetical was posed. After Lawyer left the firm where she represented one member of a joint defense group, Lawyer was approached and asked by a new client to represent him and file civil suit against the members of the joint defense consortium who were not Lawyer's client.168 The questions asked of the ABA Ethics Committee included: (a) what are Lawyer's obligations to her prior client who had been a member of the joint defense group? and (b) what are Lawyer's obligations to the other members of the joint defense group?169

The ABA Ethics Committee analyzed the questions separately. In analyzing Lawyer's obligations to her former client, the ABA Ethics Committee looked toward Rule 1.6 and Rule 1.9170 of the Model Rules of Professional Conduct. Rule 1.6(a) provides that: "A lawyer shall not reveal information relating to their representation of a client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation."171 The ABA Ethics Committee ruled that paragraph (a) of Rule 1.6 was potentially applicable because the joint defense group may have shared work product that would enjoy qualified immunity from discovery.172 It also may have shared "attorney-client confidences" within the "allied lawyer" doctrine of In re LTV Securities Litigation, under which such confidences can be shared with counsel for another party without loss of the attorney-client privilege.173 In the ABA Ethics Committee's opinion shared information of both kinds would count as "information relating to the representation of a client" under Rule 1.6(a), even if it came from a member of the joint defense group other than the client of Lawyer.174 Lawyer would be prohibited from disclosing that information except with the consent of her former client.

It follows that a lawyer's obligations to his client are not violated under Rule 1.6(a) when a lawyer uses the communications of a defector whether those communications are embraced under the work product doctrine or the doctrine permitting allied lawyers to share cli-
ent confidences, to cross-examine the defector so long as a lawyer's client consents. If a bar exists, it arises elsewhere.

Rule 1.9(a) and (c)\textsuperscript{175} offer protection for a former client. The ABA Standing Ethics Committee treated only a lawyer's contractual client, not the other members of the joint defense group, as a "client" for purposes of the protection of the rule.\textsuperscript{176} This construction of the "client's" identity renders Rule 1.9 irrelevant to a former member of the joint defense group. The defector was never a client and therefore cannot be considered a former client. Further, it cannot be said that the defector and the client have materially adverse interests when the defector has no stake in the outcome of the proceedings against the lawyer's client. The defector is merely a prosecution witness and not a person with interests adverse to the client of lawyer.

Rule 1.9(c) prohibits a lawyer who has formerly represented a client from using information related to the representation to the disadvantage of the former client except as Rule 1.6 allows.\textsuperscript{177} The ABA Ethics Committee assumed that only the client's consent was required because the other members of the joint defense group were not construed as "clients" for purposes of Rule 1.9(c).\textsuperscript{178} Applying Rule 1.9(c) to the situation of the cross-examination of a defector from the joint defense group, again it seems that client's consent is sufficient to allow the lawyer to cross-examine the defector with joint defense communications without the lawyer running afoul of the prohibitions of Rule 1.9(c).

The ABA Ethics Committee found that in its hypothetical, as a practical matter, it was likely that the joint defense members agreed to keep their exchanged information confidential.\textsuperscript{179} The lawyer would then owe his client a duty to honor that agreement but the client could release the lawyer from the obligation.\textsuperscript{180} The question then is the extent of the lawyer's obligations to the other members of the joint defense group who were not his clients but from whom he received confidential information. The ABA Ethics Committee ruled that a lawyer does not have any ethical responsibilities pursuant to Rules 1.6 or 1.9 to other members of the joint defense group from whom he received confidential information.\textsuperscript{181} Rather, the ABA Ethics Com-

\begin{itemize}
\item \textsuperscript{175} Model Rules, supra note 103, Rule 1.9(a), (c).
\item \textsuperscript{176} See Formal Op. 395, supra note 166, at 3-4.
\item \textsuperscript{177} Model Rules, supra note 103, Rule 1.9. The crime-fraud and the lawyer-client dispute exceptions as discussed in Model Rules, supra note 103, Rule 1.6(b)
\item \textsuperscript{178} Formal Op. 395, supra note 166, at 4.
\item \textsuperscript{179} Id. at 3.
\item \textsuperscript{180} If the client contractually agreed with the other members of the joint defense group to preserve the confidentiality of the exchanged information, and the client thereafter consented to lawyer's use of the information, the ABA opinion ruled that the lawyer would be freed of the ethical obligation of Rule 1.6(a) although the client would be exposing itself to liability for breach of the confidentiality agreement. Id. at 3.
\item \textsuperscript{181} Id. at 4-5.
\end{itemize}
mittee thought any duty of confidentiality that a lawyer owed to the other members of the joint defense group arose from case law, opining that the lawyer would “almost surely” have a fiduciary obligation to the other members that might lead to his disqualification.\(^\text{182}\)

In the facts posed in the hypothetical before the ABA Ethics Committee and again in *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*,\(^\text{183}\) the confidences of the other members of the joint defense group were about to be used to their detriment.\(^\text{184}\) One could understand why fiduciary duty would prevent a lawyer from exploiting the communications of those who are not his client to the detriment of the makers of the communications. The policy encouraging the formation of joint defense groups would be undermined if the communications of members of the joint defense group could later be used to harm the makers of the communications.

This situation is distinguishable from the case of a lawyer using a defector’s joint defense communications to cross-examine him when he testifies as a nonparty witness for the prosecution against his former co-defendants in a criminal action. The defector’s confidential communications are not being used to his detriment because he has nothing at stake. The defector is not an adverse party, in the criminal action in which the co-defendants are on trial. Moreover, the defector made the communications for the express purpose of providing his co-defendants with information to defend themselves. The information is used for the very purpose the communication was made. In addition, using communications made to the joint defense group to cross-examine the defector advances the policies underlying the joint defense doctrine. The doctrine was designed in part to encourage co-parties to gather useful information from those most likely to possess material information and from whom formal discovery is otherwise unavailable.

The import of the ABA Ethics Committee’s ruling is that: (1) the use of information received by Lawyer from Client’s co-defendants is not barred by ethics rules when the client consents and (2) for purposes of the applicability of the rules of ethics, merely joining a joint defense group does not convert the client’s co-defendants into clients. The extent of a lawyer’s obligations owed to the other members of the joint defense group, if any, arise from other doctrinal sources, such as fiduciary duty law or perhaps contract law. The scope of the confidentiality to be attached to joint defense communications under the joint

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\(^{182}\) *Id.* at 5 (applying a fiduciary duty running towards the non-client members of a joint defense group, and holding that a lawyer should be disqualified in a civil suit from bringing an action against a former civil co-defendant of his client, when there is a substantial relationship between the subject matters of the two representations and confidential information was shared in the prior representation) (citing *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977)).

\(^{183}\) 559 F.2d 250 (5th Cir. 1977).

defense doctrine is a fresh question of evidence law, not professional responsibility law.\textsuperscript{185} The rules of professional ethics as they are now written do not apply to prevent the cross-examination of a defector to the joint defense group. Ethical obligations that are imposed, by way of fiduciary duty law or under evidence law, should strive to give maximum effect to the policies underlying the joint defense doctrine. The should not impede them by mistakenly attaching ethical obligations that risk a lawyer’s disqualification in representing his client.

B. The Constitutional and Fairness Issues

The joint defense “privilege” is recognized to preserve Sixth Amendment guarantees and to aid the right to counsel in presenting a defense. It is particularly anomalous to construe it in a way that defeats Sixth Amendment guarantees, such as the right to confrontation and counsel of choice. Consider a simple illustration of this problem. Suppose a grand jury suspects that a corporation has overcharged the Department of Defense for defense contract work. The several corporate officers and the corporation may all be targets\textsuperscript{186} of the grand jury investigation. The suspected individual and corporate wrongdoers could hire one lawyer to represent everyone during the investigation.\textsuperscript{187} This would be efficient given the overlapping facts. To avoid the conflicts of interest inherent in one lawyer representing multiple clients,\textsuperscript{188} each corporate officer and the corporation itself could retain separate counsel. Despite being repre-

\textsuperscript{185} For a discussion of this and the lawyer’s fiduciary duty to the joint defense group, see infra part IV.

\textsuperscript{186} A “target” is someone about whom the grand jury has sufficient information to find that probable cause exists to believe the person has engaged in criminal misconduct. \textit{See} U.S. Dept’ of Justice Manual, § 9-11.150 (1996). A subject is someone whom the grand jury is investigating because of allegations of criminal misconduct, but about whom the grand jury has not gathered sufficient information to find probable cause to indict. \textit{Id.} If sufficient evidence is found, a subject then becomes a target. \textit{Id.} Grand jury targets and subjects are distinguished from a third category of persons, those who are mere witnesses. \textit{Id.}

\textsuperscript{187} \textit{See} N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.28 (1996). This section, a codification of DR5-109, states:

\begin{quote}
When a lawyer employed or retained by an organization is dealing with the organization’s directors, officers, employees, members, shareholders or other constituents, and it appears that the organization’s interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents. 
\end{quote}

\textit{Id.} This warning is designed to inform individuals that they are not being jointly represented by the corporation’s attorney as soon as it appears the individual’s interests may be different from those of the corporation.

\textsuperscript{188} Model Code, supra note 107, DR 5-105; Green, supra note 17, at 1203; see also Gary T. Lowenthal, \textit{Successive Representation by Criminal Lawyers}, 93 Yale L.J. 1 (1983) (discussing conflicts inherent in representing a client in a criminal case in which a previous client is involved); see infra notes 51-55 and accompanying text.
sented by separate lawyers, the co-defendants\textsuperscript{189} may recognize the benefits of a coordinated defense in which they can pool information about factual and legal issues in which they share a common interest. The separately retained lawyers and their clients may meet together, talk in confidence, devise a common strategy where suitable, and share factual information in those areas where there is mutuality of interest—all in an effort to advance their mutual defense against the common impending criminal charges.

Suppose, however, that the prosecutor, as frequently happens, determines the prosecution's interest in securing convictions might best be advanced by inviting one target of the grand jury investigation into the government's camp to become a prosecution witness. To convince one member of the joint defense effort to break ranks with the defense, the prosecutor may tender a favorable plea bargain. A cooperation bargain is struck, and the former member of the joint defense group will defect to the government's side, becoming a government witness. The timing of this enticement is up to the prosecutor: it could occur before indictment, on the eve of trial or sometimes even in the middle of a trial.\textsuperscript{190} No one disputes that when one co-defendant turns into a government witness, the joint defense doctrine operates to prevent the prosecutor from learning what the co-defendants said in the joint defense meetings.\textsuperscript{191} The joint defense doctrine prohibits the government from eliciting joint defense communications of the other co-defendants from its cooperator.\textsuperscript{192}

But the question of what the defense can elicit on cross-examination at trial from the cooperator who defected from the joint defense group generates constitutional and ethical problems. The lawyers for the co-defendants may have divided loyalties: a duty not to reveal the

\textsuperscript{189} Technically, targets of grand jury investigations do not ripen into defendants and co-defendants until after a charging instrument, such as an indictment, information, or complaint, is filed. For the simple purpose of uniformity, however, this Article uses the commonly understood term "defendants" even when referring to preindictment "targets."

\textsuperscript{190} For example, in the middle of the trial of several co-defendants charged with bombing the World Trade Center in New York, one co-defendant defected to the prosecutor's camp to testify as a cooperating government witness. \textit{Terrorism in America}, Baltimore Sun, Feb. 11, 1995, at 8A.

\textsuperscript{191} \textit{E.g.}, Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965).

\textsuperscript{192} \textit{See} United States v. Aulicino, 44 F.3d 1102, 1117 (2d Cir. 1995). In Aulicino, the court refused to find a Sixth Amendment violation when a member of the joint defense group turned into a government cooperator yet attended a subsequent joint defense meeting. \textit{Id.} The court approved the steps the government took "to insulate the attorneys prosecuting the case from any knowledge gained by [the defector] from his contacts with the codefendants after he agreed to cooperate." \textit{Id.} In Aulicino, the Sixth Amendment should have controlled because indictment had occurred. A Sixth Amendment claim would attach neither before indictment nor before the co-defendants' first court appearance on the charges. Therefore, any protection for joint defense communications flows not from the Sixth Amendment but from some other doctrine of confidentiality before indictment.
witness' joint defense confidences during cross-examination and a
competing duty to defend the client on trial vigorously against the
charges. Many questions remain. Do the lawyers have an actual con-

cflict of interest amounting to per se violation of the Sixth Amendment
guarantee of effective assistance of counsel? Should the lawyers rep-

resenting the co-defendants on trial be disqualified? If so, would such
a disqualification infringe upon the Sixth Amendment presumption in
favor of retained counsel of choice?193

Although the constitutional guarantee of counsel of choice is a pre-

sumption,194 not an absolute right, nonetheless it is a right that should

not be minimized in a trial context. For example, in a complicated
white collar criminal prosecution, the lawyer may have invested a
great deal of time, perhaps years, trying to understand the series of
complex transactions that the government deems a fraudulent scheme.
The lawyer will have spent time studying documents, learning the
facts and exploring the pitfalls of the government's case. In the course
of this preparation, the lawyer will have developed a relationship with
the client, a rapport on which the client relies and invests confidence.
The lawyer and the witnesses also may have developed relationships.
The lawyer also may have developed a working relationship with the
prosecutor, which might make access to § 3500195 material come ear-

lier than the court would order or which might result in informal dis-
covery not mandated by the rules.196 The client's psychological need
for continuity of the professional relationship is important. Given the
client, witness, and prosecutor relationships, and knowledge, this law-
yer is without doubt the person best prepared to try the case. To dis-
qualify this lawyer because a co-defendant has turned into a
government witness will have devastating effects on the trial advocacy
and a devastating psychological impact on the client.197 It could entail
substantial delay while a new lawyer prepares to try the case. The
delay plus the client's demoralization, because of the loss of his law-
yer, may contribute to the client's sense of inevitable doom, rendering
him less willing and capable of assisting the new lawyer in developing
his defense.

In addition, the client who loses his lawyer because a former co-
defendant turns into a government witness is likely to view the crimi-
nal justice system with distrust. Such a client may conclude the trial is
a sham, may feel the deck is unfairly stacked against him, and may not
be willing to mount the rigorous defense our adversary system of jus-

Sixth Amendment right to choose one's own counsel).
194. See id., 486 U.S. at 159.
197. For an in-depth discussion of attorney disqualification in white collar criminal
defense cases, see Forsgren, supra note 148.
tice requires if is to work fairly. Interference with a defendant's counsel of choice should not occur where the defendant has taken the precaution of retaining a separate lawyer. The defendant has done all that could be expected of him to avoid conflicts. His choice of counsel should be protected and respected.

Courts have assumed that the defendant's waiver of the confrontation clause right to full and vigorous cross-examination, based on the defector's communications to the joint defense group, could cure the lawyer's conflict of interest. Courts have extracted such a waiver as the condition for not disqualifying a criminal defendant's counsel of choice where the lawyer must cross-examine a former member of the joint defense group. This squarely pits the right to confrontation against the right to counsel of choice. Compromising cross-examination impedes the search for the truth.

When faced with the prospect of disqualification of their lawyer because the lawyer possesses confidences of a defector, some defendants will knowingly waive their right to conflict-free counsel and agree to limit the scope of cross-examination. The court is not required, however, to accept the defendant's waiver of conflict-free counsel and can disqualify the lawyer at its discretion. By entering into a joint defense arrangement, the defendant appears to have lost control over retaining his lawyer of choice. Several events beyond the control of the defendant can combine to deprive the defendant in a joint defense

198. Wheat, 486 U.S. at 158 (discussing the disagreement among the courts of appeals over whether a defendant's waiver of an attorney's conflict of interest may be overridden); see United States v. James, 708 F.2d 40, 45-46 (2d Cir. 1983) (holding that attorney cannot cross-examine based on confidential information); United States v. Cunningham, 672 F.2d 1064, 1073 (2d Cir. 1982) (limiting cross-examination to matters of public record); Forsgren, supra note 148, at 1238 & n.111.


201. Wheat, 486 U.S. at 162. Wheat involved a case of multiple and successive joint representation, not a joint defense arrangement; its legal standard for disqualification may be inapposite. Wheat's disqualification analysis should not be automatically transposed to the context of a joint defense arrangement when one member defects and will be cross-examined based on confidential communications. In Wheat, the possible prosecution witness was not only a co-defendant but had had an actual attorney-client relationship with the lawyer. Id. at 156-57. The rules of professional conduct indisputably apply. In the case of a joint defense agreement, no ethical obligations exist under the Code of Ethics between a lawyer and his client's co-defendants who enter into a joint defense arrangement. Formal Op. 395, supra note 166, at 4-5. Wheat's disqualification rule should not apply for an even more fundamental reason. At least in Wheat disqualification of counsel solved the conflict of interest, preserving the guarantee of effective assistance of counsel. Disqualification of counsel, however, in the context of a joint defense group when one member defects to testify against his co-defendants cannot solve the problem identified by the courts, preservation of the putatively confidential information. See infra part III.C.
group of his lawyer and impair his Sixth Amendment right to present a defense. These events include: (1) the government inducing, through a promise of immunity or a plea bargain, a member of the joint defense group to testify as a prosecution witness; (2) the defecting witness' desire to protect the confidentiality of his statements to the joint defense group; and (3) the government's motion to disqualify and the court's rejection of a defendant's knowing waiver of conflict-free counsel. As the joint defense "privilege" now stands, the right to counsel of choice can quickly collapse. The defendant's willingness to waive his constitutional rights to conflict-free counsel and to full cross-examination may not suffice to prevent the disqualification of counsel. The defendant should not be required to relinquish the right to counsel of choice. The present construction of the joint defense doctrine, because it entails a serious risk of counsel disqualification, chills the formation of joint defense groups. This infringes the defendants' Sixth Amendment right to pursue a coordinated defense.202 Deterring joint defense groups jeopardizes the balance of the adversary process and compromises the truth seeking mission of the trial. A system of rules that recognizes a joint defense privilege to encourage joint defense arrangements but which simultaneously undermines joint defense arrangements by imposing risks of disqualification and denial of other rights such as confrontation—is internally inconsistent, bordering on the incoherent if not the irrational.

A better reasoned conceptualization of the scope of the joint defense privilege can be achieved. Protection for confidential communications in pursuit of a joint defense need not depend on the attorney-client privilege. Just because the doctrine protects the confidentiality of joint defense communications from an adversary, it need not also preclude the joint defense members from using such communications to advance their defense if one member defects.

C. Disqualification Is No Solution

Courts have threatened to disqualify the counsel of those joint defense members continuing to trial to preserve the confidences of the defector who testifies as a government witness. Even if the court disqualifies a co-defendant's lawyer, any attempt to preserve the confidentiality of the government witness' statement has only marginal chances of success. Disqualification, though costly, may accomplish little to nothing. After all, the remaining clients in the joint defense group also may have knowledge of the defecting member's statement. If the defector's statement would be helpful in securing acquittal, the remaining defendants can be expected to reveal it to any new lawyer. The Court will have difficulty preventing an exchange of this informa-

tion between the client and new counsel. Indeed, if the information would present a powerful opportunity to undermine the credibility of an important witness against the defendant, it is only natural for the defendant to want to disclose the information to the new lawyer even though the client knows of a court instruction to the contrary. The client may not reveal to this new lawyer that the source of this information was confidential joint defense communications or may forget the confidential nature of the source of the information. In addition, the attorney-client privilege would hinder the court’s efforts to discover whether the source of the information was confidential joint defense communications. Plainly, disqualification of the first lawyer cannot secure the nonuse of the defector’s confidential joint defense communications whenever they have been shared with the client participants in the group. Disqualification may fail to do anything more than interfere with counsel of choice, eliminate the best prepared person to try the case and increase the costs of the defense.

IV. RECONCEPTUALIZING THE PROTECTION FOR JOINT DEFENSE COMMUNICATIONS

While joint defense groups are recognized to be important to the fair defense of a trial with multiple co-defendants, there is significant uncertainty in the law regarding the specifics of the joint defense privilege. Parties enter into complicated, and perhaps unenforceable, agreements to protect the confidentiality of communications shared among joint defense participants. Some joint defense agreements contain language stating that a joint defense member who becomes a government witness waives any right to preclude the use, in his or her cross-examination, of information acquired from the testifying witness which information the witness gave to the joint defense effort confidentially. Id. at 13.

If the basis for the confidentiality of the joint defense communications is the attorney-client privilege, such a provision may destroy the applicability of the attorney-client privilege, subjecting all of the communications to disclosure, not just the communications of the cooperating witness. The premise of the attorney-client privilege is one of absolute confidentiality, not contingent confidentiality. Of course, a client may later choose to waive the confidentiality. Agreeing up front to waive confidentiality if a specific event occurs is not making disclosure premised on absolute confidentiality and later changing one’s mind to relinquish confidentiality. Since the attorney-client privilege does not apply unless at the time the communications occurred they were intended to be kept confidential, it is questionable whether it applies to communications which clients agree need not be kept confidential if certain events transpire.

Thus, if the attorney-client privilege is the basis for protecting joint defense communications, contract provisions such as the one outlined above may destroy the application of the privilege. It is also questionable whether a contract purporting to require a waiver over the objection of the person being compelled to waive the attorney-client privilege would be specifically enforceable should that party change his mind and refuse to waive the privilege in the event he becomes a testifying prosecution witness against his former joint defense allies. The public policy supporting the recognition of the privilege may be undermined if courts were to enforce contract provisions specifically enforcing a nonrevocable waiver of the privilege.

The fact that parties entering into joint defense agreements are willing to waive the confidentiality of disclosures should a member become a testifying government wit-
with co-parties while trying to solve the disqualification and limited cross-examination questions.\textsuperscript{204}

A. Distinguishing Protection for Joint Defense Communications from the Attorney-Client Privilege and the Work Product Doctrine

The attorney-client privilege protects confidential communications made between client and lawyer where the communications are made for the purpose of obtaining legal advice.\textsuperscript{205} Disclosure of such communications to third parties—such as co-defendants or their counsel—is inconsistent with the traditional confidentiality requirements of the rule and waives the privilege. An exception is allowed when the disclosure to co-defendants or their counsel has occurred in the context of an agreement to pursue a coordinated defense. This is known as the joint defense exception to waiver of the attorney-client privilege.\textsuperscript{206} But, it is unclear that the foundation of the joint defense privilege correctly lies in the attorney-client privilege—which provides absolute confidentiality except in very limited circumstances.\textsuperscript{207} The joint defense privilege also protects work product material shared between members of a joint defense arrangement. The theoretical foundation for protecting communications in the aid of a joint defense may


\textsuperscript{206} See Weinstein & Berger, supra note 21, ¶ 503(b)(06).

\textsuperscript{207} The attorney-client privilege will not protect the confidentiality of communications where the crime-fraud protection applies, where the lawyer and client are engaged in dispute or where multiple clients later are involved in litigation against each other. See id. ¶ 503(b)(04) (discussing the interrelation of attorney-client privilege and the work product doctrine).
also be rooted in that doctrine. To the extent the joint defense "privi-
lege" protects communications occurring directly between a client and
his co-defendant's lawyer, or between two co-defendants in the pres-
ence of defense counsel, the joint defense doctrine protects material
neither the attorney-client privilege nor the work product doctrine
embraces.208

1. Comparing the Attorney-Client Privilege to the Joint
Defense Doctrine

In assessing whether to divorce the joint defense doctrine from the
attorney-client privilege, it may be useful to consider some of the dif-
ferences between the two. The attorney-client privilege recognizes,
endorses, and supports a socially esteemed relationship between legal
advisor and client.209 The communications between them are pro-
tected from disclosure for a variety of reasons. The protection is be-
lieved to encourage frank communications, which enable the lawyer
to give legal advice based on sound factual footing. Open communi-
cations produce well-prepared advocates.210 Frank communications
also help secure a more accurate development of facts, weed out weak
claims and defenses, and thereby serve the fair administration of jus-
tice. This is efficient and results in the conservation of judicial re-
sources for claims and defenses that warrant a trial instead of a
settlement.211 The attorney-client privilege respects the privacy of indi-
viduals.212 It recognizes the right of individuals to plan their affairs
in an orderly fashion, secure in the knowledge that they have had the
benefits of legal advice.213 The attorney-client privilege rests on a be-
lief that in an adversary system, a client's full disclosure is required to
provide skillful advocacy and sound legal advice. The privilege exists
to allow attorneys to assure their clients that the information they give
to their legal advisors will not come back to harm them.214 The attor-
ney-client privilege also stimulates greater numbers of people to seek
legal advice in pursuing their plans, and thereby discourages unlawful
activity.215 This reduces social wrongdoing. These goals of the attor-
ney-client privilege are achieved independently of the joint defense

208. But see In re Megan-Racine Assocs., Inc., 189 B.R. 562, 571 (Bankr. N.D.N.Y.
1995) (stating that joint defense privilege can only exist where there is an applicable
underlying privilege as the attorney-client privilege or the work product doctrine).
209. See 8 Wigmore on Evidence § 2291 (1940).
211. See Deborah S. Bartel, Drawing Negative Inferences upon a Claim of the Attor-
212. James A. Gardner, A Re-Evaluation of the Attorney-Client Privilege, 8 Vill. L.
213. Developments in the Law, supra note 205, at 1505-07.
214. Chase Manhattan Bank v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir.
215. See id.
doctrine, by the confidentiality afforded to communications between legal advisor and client.

Unlike the attorney-client privilege, protection for communications in pursuit of a joint defense does not encourage communications between the client and his lawyer. The joint defense doctrine encourages different persons to communicate with each other. Three distinct types of communications are encouraged: (1) communications between the lawyers for the co-parties; (2) communications between the clients who are co-parties, if they take place in the presence of counsel; and (3) communications between a lawyer and other "third parties having a common interest." The communications between the client and his own lawyer, however, are already facilitated by the protection of the traditional attorney-client privilege. The joint defense doctrine adds nothing to that already stimulated communication.

The interests served by the joint defense doctrine are distinct from the interests served by the attorney-client privilege. The joint defense doctrine exists to preserve fairness in the trial by allowing multiple co-defendants an opportunity to coordinate their defense instead of being relegated to the unfair position of presenting inconsistent defenses without the benefit of allied strategy. In addition to the goal of fairness and balance in the adversary system, the joint defense doctrine serves the interests of efficiency. Sharing labor reduces the expense of litigation. Eliminating unnecessarily inconsistent defenses should shorten a trial's duration and conserve judicial resources. The joint defense doctrine promotes fairness and efficiency by giving parties access to information they otherwise would not have. The joint defense doctrine, unlike the protection for attorney-client communications, does not bestow social benefits outside of the litigation. The only interests to be served are those of the litigation process itself.

The joint defense doctrine serves other important goals of fairness. Multiple co-defendants tried jointly should enjoy the same right as defendants who are tried separately to present a cohesive defense. When a single party is made to defend alone, that party inherently has the ability to present a coherent, consistent, and unified theory of defense. Simple fairness, and the principle that similarly situated persons be treated the same, require that co-defendants tried together have the same opportunity to present a unified defense.

The joint defense privilege also allows the co-parties to divide responsibility for factual investigation and prepare the various cross-examinations. This allocation of responsibility accomplishes two things. Because each of the lawyers can concentrate his effort on the allo-

cated tasks rather than being spread thin across the board, the defense case is more thoroughly prepared. Promoting a more prepared case furthers the goals of the adversary system—which expects truth to emerge where each side has offered its best case.

The joint defense doctrine restores balance to our adversary system that would otherwise be lacking in cases involving multiple co-defendants. The imbalance would impede the fairness of the trial contest and the quest for truth. The restoration of balance serves the interests of both fairness and truth-seeking. The joint defense doctrine accomplishes these social benefits independently of the attorney-client privilege.

2. Comparing the Joint Defense Doctrine to the Work Product Doctrine

The core rationale of the work product doctrine218 is that opposing counsel should not enjoy free access to an attorney's thought processes.219 This protection extends to an attorney's legal theories, litigation strategies, trial tactics, impacting on the attorney's methods of preparing trial information.220 The work product doctrine provides a "privileged" area where an attorney "can analyze and prepare his client's case."221

The work product doctrine seeks, consistent with the main objective of discovery under the Federal Rules of Civil Procedure,222 to attain "privacy for trial preparation to facilitate the adversary system of justice."223 It is the general thesis of the adversary system that truth emerges from opposing sides presenting evidence and that this proceeds best where the opposing sides "competitively develop their own sources of information."224 A second rationale supporting the work product doctrine is one of client protection. It is believed that each lawyer and litigant requires a zone of privacy in which to function to pursue the litigant's interests.225 If a lawyer or litigant fears disclosure of work product, he might forego useful preparation, including notetaking.226 Work product immunity entails duplicative effort by

218. Protection for work product, immunizing it from discovery to an adversary, was first recognized in Hickman v. Taylor, 329 U.S. 495 (1947), and then codified in the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(b).


220. Hickman, 329 U.S. at 511.


223. Id. § 136 cmt. b.

224. Id.

225. Id.

226. Id.
opposing sides of investigative effort, thereby resulting in increased litigation costs, however, the benefits to the adversary system and its truth seeking mission are believed to outweigh these costs.

Work product immunity is broader than the attorney-client privilege to the extent that it protects more than just communications between the lawyer and client, for work product includes many other kinds of material. The protection of the work product doctrine is not lost by disclosure to a third person, as is the protection of the attorney-client privilege. The work product doctrine "protects information 'against opposing parties, rather than against all others outside a particular confidential relationship,'" and "[c]ounsel may therefore share work product, including ideas, opinions, and legal theories, with [those having] similar interest in fully preparing litigation against those having a common adversary." Parties conducting a joint defense may share work product without waiving the protection of the doctrine.

The joint defense doctrine permits the sharing of more than just work product material. The joint defense doctrine permits both attorneys and clients to share with those engaged in the joint defense effort, either co-defendants or their lawyers, the communications between them if the communications occurred for the purpose of advancing the joint defense effort. This sharing of client-lawyer communications is not permitted by the strict application of the work product doctrine or the traditional attorney-client privilege. The work product doctrine is limited to the anticipation of litigation. The protection of the joint defense doctrine has sometimes been extended beyond the context of litigation.

The joint defense doctrine's goal of achieving balance in the adversary process is similar to the goal of the work product doctrine. The work product doctrine promotes the fairness of an adversary system by protecting the privacy of the lawyer's mental processes, fact gathering, and encouraging the lawyer's trial preparation. The joint defense privilege is not concerned with the privacy of lawyers. In fact, it encourages the lawyer to disseminate information within certain confined limits, not maintain its privacy. Whereas the two doctrines share a certain fundamental goal of fairness in the adversary system, they are distinct in their effort to achieve that goal.

227. See id. cmts. g-i (stating that lawyers, nonlawyers, and expert witnesses all may be the source of work product protected material).
228. In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982) (holding that the protection is not "automatically waived" by disclosure to any third party).
230. Id.
232. Id. at 514 (holding that common interest could be found in development of common patent program even if the advice was not focused on pending litigation).
The joint defense doctrine is less concerned with lawyers' privacy and operates to protect more than the lawyer's work and mental process. The joint defense privilege protects the dissemination of information between clients, so long as it occurs in the presence of lawyers, for the purpose of pursing an agreed-upon common defense. It also protects from discovery communications between a lawyer and his client's co-defendant if the communications are pursuant to a joint defense.

One feature common to the work product doctrine and the joint defense doctrine is the degree of confidentiality required to preserve the protection. Disclosing work product information to a third party does not necessarily destroy the confidentiality required by the doctrine. Only disclosure inconsistent with the purpose of the protection destroys the work product doctrine. Similarly, the joint defense privilege allows the sharing of information between a client and his lawyer with third persons who share a common legal interest in an anticipated or pending litigation. This disclosure is not inconsistent with the purpose of the protection: to encourage persons with common legal interests to communicate in pursuit of their common goals. A disclosure to someone who does not share common legal interests is inconsistent with the purpose of the privilege.

The joint defense doctrine shares some characteristics of the work product doctrine. First, the degree of confidentiality that is contemplated by the joint defense privilege forbids disclosure of confidential information to adversaries, but allows the information to be shared with those who are allied in interest. Second, the joint defense doctrine shields ideas, mental impressions, and witness interview information from disclosure to adversaries. The information can be shared only with those allied in interest—but there must be an agreement to pursue a joint defense before its protection will apply, whereas no corresponding agreement is necessary to preserve the protection of the work product doctrine.

While the joint defense doctrine protects attorney-client communications and work product, the joint defense privilege is not a simple amalgamation of the attorney-client privilege and the work product doctrine. It protects some things that neither the attorney-client privilege nor the work product doctrine protect. For example, if two co-defendants communicate with a lawyer representing another co-defendant.

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233. United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir. 1989); Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965).
236. See id. at 447-48 (stating that waiver occurs only if disclosure to a third person substantially increases the likelihood that the material will reach an adversary).
237. Weinstein & Berger, supra note 21, ¶ 503(b)[06].
fendant and the communication is about a common defense, the joint defense doctrine, not the attorney-client privilege, shields the communication from disclosure to an adversary. A defendant can also communicate directly with separately represented co-defendants in the presence of counsel and these communications are protected by the joint defense doctrine. Neither the attorney-client privilege nor the work product doctrine protects such communication from an adversary. The joint defense doctrine assures that these communications are kept confidential from an adversary. Thus, the joint defense doctrine protects communications that the attorney-client privilege and the work product doctrine may require to be disclosed.

B. Reconceptualizing the Protection for Communications in Pursuit of Matters of Common Interest

In recognizing the joint defense doctrine, courts use an analogy to the attorney-client privilege as applied to communications shared between a single lawyer representing multiple clients with common interests. The analogy may have initially been reasonable, but has recently raised ethical problems. The distinct benefits and protections warrant abandoning the attorney-client privilege as the justification for the protection of joint defense communications. The policy's justifications—preserving fairness and balance in the adversary system and promoting efficiency in the litigation—are worthy enough to justify recognition of the protection for joint defense communications independently of the attorney-client privilege and the work product doctrine. A theory of the joint defense doctrine should achieve its goals without violating constitutional rights or placing unfair demands on lawyers that may foster imbalance in the adversarial system of justice.

It is useful to determine whether the protection to be afforded communications in pursuit of matters of common interest should operate as a privilege or a more qualified doctrine of protection. A privilege, like the attorney-client privilege, exists to advance social policies beyond the litigation context. A judicially administered doctrine of con-

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239. Hodges, Grant & Kaufmann v. United States, 768 F.2d 719, 721 (5th Cir. 1985); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977).
fidentiality, like the work product doctrine, exists to serve policies related to the litigation. The protection for joint defense communications is akin to the latter. The protection should be recognized as a doctrine, not a privilege. This protection of confidentiality is essentially "a tool of judicial administration, borne out of concerns over fairness" and designed to protect the balance of the adversary system. It lacks any extrinsic value outside of the litigation context, a key feature of a "privilege." In this way it more resembles the work product doctrine, whose value is similarly limited to the litigation arena, than the attorney-client privilege, whose social benefits extend beyond a litigation. The protection afforded joint defense communications should resemble more an immunity from disclosure, which is qualified, rather than a privilege of the type protected by Rule 501 of the Federal Rules of Evidence.

Formulating a common defense, when possible, requires communication. Unless communications are protected from disclosure, defendants will hesitate to coordinate strategy. However, if protection for these communications comes at the cost of the possible disqualification of one's lawyer, the price tag for a coordinated defense may be too great. This could make co-defendants reluctant to join joint defense groups and, in any event, would impair the honesty of communication. When joint defense agreements are reduced to writing, they contemplate that if someone defects, the defector will be cross-examined on the basis of his communications to the joint defense group. This stipulation does not deter joint defense groups.

The joint defense doctrine should be understood to impress upon lawyers a fiduciary duty to use the confidences received in a joint defense arrangement only for the joint defense group's defined purpose, that is to defend the members of joint defense arrangement with respect to the transaction discussed or the proceedings anticipated. Confidential communications between co-defendants pursuant to a joint defense arrangement are given with the expectation that the confidential communications will be used by the recipients to defend themselves against the anticipated charges. Such information should be received under a duty to keep it confidential, unless it may be used to advance the agreed upon legal cause of the members of the joint defense arrangement who are privy to the information. The duty of confidentiality should require that confidential joint defense information be protected from even voluntary disclosure by fewer than all members of the joint defense group, except where the information

244. One might imagine a scenario where one defendant seeks to raise confidential communications of another co-defendant on trial to which that co-defendant objects. See United States v. McPartlin, 595 F.2d 1321 (7th Cir.), cert. denied, 444 U.S. 833
would aid in the defense of the joint defense arrangement. In these instances, disclosure and use of the communications are not only permissible, but expected.

The duty of confidentiality limits the recipient of information, like a fiduciary, to using the information solely for the purpose for which it was given. This duty attaches when the information is received. It should make no difference to the joint defense group that the information-giver did not proceed to trial for any reason, including but not limited to death, the statute of limitations, an absence from the jurisdiction, a failure to be indicted, immunity, a guilty plea, or a guilty plea coupled with cooperation as a government witness. Nonetheless, information was given to enable the other members to use it for their defense. The defector should not be permitted to breach the agreement and deny the group the use of information he gave especially because he may have taken advantage of the information learned through the joint defense communications, by other co-defendants in deciding to cooperate with the government. A subsequent event such as the information-giver becoming a government witness or an event being brought about by the prosecutor, should not deprive the members of the joint defense group of the ability to use the information. Nor should a defection to the government's side, an event likely initiated by the prosecution, provide a basis to disqualify lawyers of the defendants who received confidential information from the defecting member. Nor should it deprive the defense of information that is valuable to its defense. To do differently gives the prosecution an undue tactical advantage.

The fiduciary duty of confidentiality impressed upon joint defense communications would not be violated by cross-examining a defecting member who became a testifying government witness and eliciting information he disclosed in joint defense communications. This construction is faithful to the purpose of the joint defense doctrine and eliminates the ethical dilemmas that arise when a joint defense member becomes a government witness. This reconsideration of the scope of the protection will not discourage joint defense communications, and will preserve the vitality of joint defense arrangements and balance in the adversary process.

Permitting limited use of the confidential communication given in pursuit of a joint defense group suggests that the protection for joint defense communications is something more flexible and akin to the work product doctrine. This construction offers other benefits. It is a narrower confidentiality doctrine; therefore, more information be-

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(1979). The confidentiality given to joint defense communications should not be used to injure the communicator. In such cases, disclosure should be permitted, but it may be necessary to sever the case or to use a simultaneous separate jury that does not hear such evidence.
JOINT DEFENSE DOCTRINE

This understanding of the privilege places no limits on the cross-examination of the defector who becomes a government witness. Consequently, the lawyers for the co-defendants on trial are freed from any conflict of interest in cross-examining the former member of the joint defense group. At trial, they owe no duty to the cooperating witness to preserve the confidentiality of his joint defense communications in cross-examining him. Their duty of loyalty to their clients remain intact. Because there is no conflict of interest, no ground for disqualification arises. As there is no threatened or actual impairment of the duty of loyalty which the lawyer owes to the client on trial, there is no violation of the right to conflict-free counsel encompassed in the Sixth Amendment. The defendant's Sixth Amendment rights to effective assistance of counsel, confrontation, counsel of choice, and the pursuit of a joint defense are preserved.

The joint defense arrangement should be governed by rules that give maximum effect to its separate goals, but not by rules that undercut the willingness of co-defendants to enter into joint defense arrangements. The joint defense doctrine needs to operate independently of the attorney-client privilege. First and foremost,

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245. There is one further exception to the protection of confidentiality for joint defense communications that should be recognized in criminal cases. It is an exception that takes into account the prosecution's legitimate need to discover the prior statements of its cooperating witness on the subject of his testimony, including statements to his lawyer and to the joint defense group. The government has a special duty not to call persons to testify without verifying as much as possible about the truthfulness of the testimony. To do this, it is useful for the prosecution to learn about their testimony.

246. If the communications given pursuant to a joint defense arrangement are to be protected independently of the attorney-client privilege, courts must determine whether such communications deserve protection. Dean Wigmore recognized four "particularly influential" conditions to establish a privilege. Wigmore, supra note 209, § 2285. These conditions center around protecting a socially esteemed relationship: (1) the communication must originate in confidence; (2) confidentiality must be essential to the willingness of the persons making the communication to speak; (3) the relationship must be one which the community wishes to foster; (4) the benefits from nondisclosure must outweigh the benefits that disclosure would bring in securing the correct disposition of the litigation. Id.; see Susan K. Rushing, Separating the Joint-Defense Doctrine from the Attorney-Client Privilege, 68 Tex. L. Rev. 1273, 1286-88 (1990).

The first criterion is satisfied by joint defense communications as long as the only persons privy to the communications are the co-parties with common interest and their respective lawyers. The communications cannot be shared with anyone who is not part of the joint defense effort. The presence of persons not part of the joint defense group will destroy the confidentiality requirement.

The second criterion is present in joint defense communications. The parties, in both civil and criminal cases, would not voluntarily reveal information that could injure their legal position. Indeed, the Fifth Amendment privilege which protects an individual against self-incrimination blocks formal discovery in matters that might tend to expose a person to criminal liability. See Robert Heidt, The Conjurer's Cir-
the joint defense arrangement needs to be freed from the ethical disqualification rules that properly govern a genuine attorney-client relationship. Joint defense arrangements do not create attorney-client relationships and should not be treated as such.

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2 Joint defense arrangements do not create attorney-client relationships and should not be treated as such. The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062 (1982). Only upon a guarantee of confidentiality or immunity would a lawyer allow a client with a valid Fifth Amendment privilege to speak to others, even if only to advance their mutual legal interests. Without the promise of confidentiality, the speaker is unlikely to disclose because his words might work to his detriment.

Wigmore's third criterion is also satisfied. The web of interrelationships between a lawyer, his client, and his client's co-parties, and the lawyers for the co-parties—when they are working together to pursue a matter of common legal interest—is worthy of societal esteem and protection for the purpose of facilitating the litigation. Coordination among co-parties and lawyers promotes balance in our adversarial system, prevents unnecessarily inconsistent defenses, and reduces the costs of litigation by allowing a division of labor among co-parties' lawyers. Coordination also allows for better factual and legal preparation.

Wigmore's fourth criterion, a cost/balancing test, also supports recognizing the joint defense doctrine. The communications allow coordination which in turn allows the multitude of societal benefits outlined immediately above. In addition, construing the joint defense doctrine as offering confidentiality to joint defense communications, except to the extent that the recipients of the information may use it to defend themselves in connection with the transactions or proceedings the joint defense group anticipated, can be achieved with lower costs than applying the attorney client privilege's impenetrable confidentiality requirement. This construction impedes the search for truth less than a construction like the attorney-client privilege because it allows the factfinder greater access to information.

247. In federal court, the law governing disqualification of counsel because of conflict of interest is governed by federal standards, not the code of ethics adopted by the state court of the state in which the federal court sits. See Wheat v. United States, 486 U.S. 153, 161 (1988).

Many state courts use the substantial relationship test when deciding whether to disqualify counsel. Under the substantial relationship test, the former client need only show that the matters in the pending case are substantially related to matters in which the lawyer previously represented the former client. "The court will assume that during the course of the former representation [client] confidences were disclosed to the attorney bearing on the subject matter" and the court will not inquire into the extent of the disclosure. T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953); see Zador Corp., N.V. v. Kwan, 37 Cal. Rptr. 2d 754, 759 (Ct. App. 1995).

A more complicated situation occurs in a civil matter when a lawyer defends an adversary of a party who was also a co-party and member of a joint defense arrangement of that lawyer's former client. In this situation the threshold question is whether the two matters are substantially related. If so, application of the substantial relationship test may require disqualification. See Wilson P. Abraham Constr. Corp. v. Armco Steel Corp. 559 F.2d 250, 253 (5th Cir. 1977) (discussing the possibility of disqualification using the substantial relationship test). But see Turner v. Firestone Tire & Rubber Co., 896 F. Supp. 651, 654 (E.D. Tex. 1995) (denying motion to disqualify counsel despite fact that counsel's former law firm previously represented co-defendant).

Overall, the benefits of recognizing the joint defense doctrine independently of the attorney-client privilege greatly outweigh the costs of confidentiality. Even where the joint defense communications are protected from disclosure, the protection is not especially costly because it does not preclude discovery of the underlying facts of the transaction. In this way its operation would be similar to the attorney-client privilege. In criminal cases, the application of the joint defense privilege imposes no additional burden on the prosecution, which is already precluded by the Fifth Amendment from compelling discovery from the defendants. A balancing scale tips in favor of protecting

testify as a government witness). Wheat, however, did not involve a joint defense arrangement, but rather, involved a case of multiple and successive representations.

Wheat's disqualification standards require a court to: (1) secure any ethical duties owed to a government witness or co-defendant and (2) protect a client's right to effective assistance of counsel, which might be compromised by a lawyer's conflict of interest. Wheat, 486 U.S. at 160-61. In addition, Wheat entrusted the district court to evaluate "the facts and circumstances of each case." Id. at 164. Wheat permits a court to disqualify a defendant's lawyer despite the defendant's knowing and intelligent waiver of conflict-free counsel. Id. at 162-63. Although Wheat's rule may be applicable to disqualification motions in a joint defense context, its operation should be different where the disqualification motion grows out of a joint defense arrangement. Wheat involved a case of genuine attorney-client relationships and involved questions of multiple representation of the criminal co-defendants by a single lawyer. E.g., Flanagan v. United States, 465 U.S. 259 (1984); United States v. Moscony, 927 F.2d 742 (3d Cir.), cert. denied, 501 U.S. 1211 (1991); United States v. Kenney, 911 F.2d 315 (9th Cir. 1990); United States v. James, 708 F.2d 40 (2d Cir. 1983); Gary T. Lowenthal, Successive Representation by Criminal Lawyers, 93 Yale L.J. 1 (1983); Peter W. Tague, Multiple Representation and Conflicts of Interest in Criminal Cases, 67 Geo. L.J. 1075 (1979); Forsgren, supra note 148, at 1237-39.

Moreover, if the joint defense privilege protects the confidentiality of communications, except that such communications may be used by the recipients to defend themselves against the transaction or charges anticipated by the joint defense group, then Wheat's disqualification standards do not favor disqualification when one member switches sides. Such an understanding of the joint defense doctrine recognizes implicitly that the joint defense arrangement itself does not create a new attorney-client relationship. Hence, the joint defense group itself creates no duty of loyalty running from a lawyer to a co-defendant of the lawyer's client. Also, because there is no new attorney-client relationship established, any confidentiality requirement arises from the joint defense doctrine itself rather than from an attorney-client relationship or the attorney-client privilege. Wheat's requirement that the ethical duties to the government witness be secured, would not warrant disqualification when the duty of confidentiality owed to the defecting member does not include a duty on the part of the remaining joint defense members to refrain from cross-examining the defector in a proceeding anticipated by the joint defense group, based on the defector's communications to the joint defense group.

Because there would be no duty to the cooperating witness not to cross-examine him based on his confidential communications to the joint defense group, a lawyer representing a co-defendant on trial would not face a conflict of interest. Therefore, Wheat's requirement that a court protect a client's right to effective assistance of counsel would not trigger disqualification because there is no conflict of interest that impairs the effectiveness of counsel for the co-defendant on trial.
communications among co-parties and their lawyers on matters of common legal interests. 249

In sum, the joint defense doctrine should treat the recipients of the joint defense communications, lawyers and clients alike, as fiduciaries entrusted with an asset—information. Fiduciary duty obliges “the fiduciary to act in the best interests of his client or beneficiary and to refrain from self-interested behavior not specifically allowed.” 250

Viewed as fiduciaries, the members of a joint defense effort who receive information from one another have an obligation not to use the information given to them in a manner inconsistent with the purpose for which it was entrusted to them. They cannot use it as a sword to injure the legal position of the information-giver but they can use it as a shield to advance their legal cause in a particular proceeding. No other use or disclosure would be consistent with their undertakings. Thus, recipients of the communications in a joint defense effort are like fiduciaries, who must protect the confidentiality of the information from disclosure to the outside world, except to the extent the re-

249. The balancing scale might tip differently when it is applied to determine whether communications are protected from subsequent use in other proceedings between the parties making the communications. Ordinarily, in the attorney-client privilege context, communications are not deemed confidential when the communicators stand in an adverse position to each other as opposing parties in litigation. Certainly, one member of the joint defense group testifying against former co-defendants does not satisfy that standard of adversity. But criminal co-defendants, and certainly civil co-plaintiffs or co-defendants, could conceivably end up in litigation against one another and seek to use the other's confidential communications or his own confidential communications to the group.

The question arises whether the joint defense doctrine should bar or allow the admission of statements. On the one hand, it is virtually impossible to stop parties from using information they have in their possession. Denying parties the use of information they already have damages the public's opinion of the fairness and truth-seeking value of the litigation process. Limiting use inter sese may serve to make parties unwilling to accept an adverse decision because it was rendered on information less complete than they possess and a party may feel she did not have her full day in court.

On the other hand, if parties know the communications can be used inter sese this will chill the frankness of any communications, undermining considerably the potential value the communications could offer the parties, the lawsuit, and the administration of justice. This is a particular risk in civil lawsuits where co-parties communicate regarding a matter of common legal interest because the threat of cross claims, subsequent lawsuits for contribution, or other legal disputes between those allied on the present legal matter is real. Although parties might argue that use of confidential communications in proceedings inter sese has the potential to chill frank communications, this argument requires further refinement. The solution perhaps could depend on whether the party seeking to use the other's confidential communication is doing so as a shield to protect himself or as a sword to harm the maker of the statement. The latter is surely inconsistent with the protection of the privilege. The former use is easier to accept, in part because a party is entitled to fairness and in part because a party, who has knowledge that he could use his own statement or the statement of the other to protect himself in a subsequent proceeding against his present ally, does not have the same incentive to be guarded in his communications as he would have if his own statement could be used as a sword against him.

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...ponents use the information to prepare, coordinate and execute a defense against the legal charges contemplated or pending. Viewed in this way, the communications can be used to advance the defense, by cross-examining the defector who turned government witness. Under these circumstances no grounds for disqualification arise.

Conclusion

Joint defense groups are important to the fair functioning of the adversary system. The joint defense doctrine should be recognized as an independent doctrine. It enables co-defendants who agree to pursue matters of common interest to communicate information to one another and to each other’s lawyers confidentially, to pool and distribute labor, and to coordinate a defense strategy of the case. This eliminates the likelihood that the several co-defendants will mount unnecessarily inconsistent theories of defense at trial, which would work to the detriment of the credibility of all. Coordination of effort is efficient, saves labor, reduces the expense of defending, and conserves valuable court time. Coordinated effort mounts the strongest attack on the prosecution’s evidence, putting the government’s evidence to a vigorous test. Coordinated defenses protect the constitutional guarantee of effective assistance of counsel. A joint defense doctrine that promotes joint defense groups helps the defense present its best case, providing necessary balance to the adversarial system.

Joint defense groups are impeded by treating this doctrine of confidentiality stimulating joint defense communications as part of the attorney-client privilege. This bars cross-examining defectors about their joint defense communications and requires either foregoing of the cross-examination based on the communication or disqualification of counsel. The spectre of disqualification chills joint defense groups from forming, contrary to the goal of the joint defense doctrine. The joint defense members who stand trial must be permitted to cross-examine a former member who has switched sides to become a testifying prosecution witness using the defector’s communications to the joint defense group. Otherwise, the change in heart brought about by the prosecution unfairly deprives the defense of information and threatens to disqualify counsel. Receipients of joint defense communications should be required as fiduciaries not to misuse the information, to protect its confidentiality to the outside world, except to the extent the information is used for the purpose it was given, to defend against the jointly anticipated legal matter.