

Ethical and Practical Challenges Representing Trade Associations and Their Members

Christopher J. MacAvoy

Attorneys who represent trade associations in antitrust investigations or litigation may face a variety of ethical and practical challenges. Most counsel are alert to situations that raise obvious ethical issues—for example, where a member asks the association’s counsel to take a position that is adverse to the interests of the association. But other issues present themselves more subtly and, in the worst cases, escape counsel’s notice until they have blown up into waiver-of-privilege or disqualification problems. Sometimes even the most basic questions—e.g., who is my client?—may be hard to answer. Other questions that may be encountered include: whether an attorney may, in the same matter, represent the trade association and a member; whether the attorney may represent a member whose interests are adverse to those of other members; whether an attorney may represent a trade association in a matter adverse to a member; whether an attorney who has represented the trade association may represent a member in a matter that is or may become adverse to the association; and whether an attorney who represented the association may, in a subsequent matter, represent a non-member in a suit against members of the association.

The common interest or “joint defense” privilege brings additional complexities to the trade association lawyer’s task. If counsel for a trade association briefs members on the status of an antitrust investigation or lawsuit, will the briefing be privileged? What happens if a member of the association tells the association’s counsel something incriminating about the member’s company, or about another member, or about association staff? Can the attorney disclose the information to other members or their counsel? If a trade association’s lawyer receives confidential information from a member pursuant to a joint defense agreement, will this affect the lawyer’s ability to accept a subsequent representation that is adverse to the member?

This article provides an overview of some of the major issues and general rules governing the attorney-client relationship between a lawyer representing a trade association and, potentially, the association’s individual members. It is not, of course, a summary or survey of all states’ applicable rules of professional ethics. Some of these issues were addressed by the Legal Ethics Committee of the District of Columbia Bar in Opinion 305, issued in January 2001. This article utilizes Opinion 305 as a reference.

Trade Associations Present Special Challenges

Black’s Law Dictionary defines a trade association as “an association of business organizations having similar problems and engaged in similar fields formed for mutual protection, interchange of ideas and statistics and for maintenance of standards within their industry.” This straightforward

■
Christopher J. MacAvoy
is a Partner in Howrey
Simon Arnold & White,
LLP. The author thanks
LaTisha Gotell for her
assistance in preparing
this article.

definition suggests some of the reasons why trade associations are different from other clients. The similarities or common interests that cause firms or individuals to join trade associations in the first place suggest they will have common legal interests, but this is by no means inevitable. Especially if the members of a trade association are competitors, their legal interests may conflict in an antitrust matter.

Many trade associations have legal counsel on staff or retainer, and access to the association's counsel may be considered a significant benefit of membership. Frequently, the association's counsel has extensive experience with the legal and regulatory issues confronting a particular industry, and members view the association's counsel as a key source of guidance. The close and trusting relationship that often exists between an association's counsel and the members can, however, sow trouble in an antitrust investigation or litigation. To some degree, the issues that arise in this context are the same as those that arise between a corporation's lawyer and the corporation's employees. The trade association context, however, brings added complexities and cross-pressures, not the least of which are the financial incentives for an attorney to represent the association and one or more members, either simultaneously or seriatim.

The close and trusting relationship that often exists between an association's counsel and the members can, however, sow trouble in an antitrust investigation or litigation.

Who Is the Client?

A lawyer has an obligation to maintain the confidences of his or her client and to avoid conflicts of interest. But when a trade association is involved, who is the client? And once the client or clients are identified, what happens if the attorney wants to represent additional clients, either in the same matter or in a subsequent but related matter? These issues were comprehensively addressed in District of Columbia Ethics Opinion 305.

Important consequences may follow a determination that an attorney-client relationship exists between trade association counsel and a member. If the matter would require the lawyer to advance two adverse positions, the representation is prohibited.¹ If the lawyer would not be required to advance adverse positions in the same manner, the representation may nevertheless call into question his or her ability to represent each client wholeheartedly and zealously. The D.C. Rules of Professional Conduct, for example, prohibit a lawyer from representing, without disclosure and consent, a client with respect to a matter if:

1. that matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;
2. such representation will be or is likely to be adversely affected by representation of another client;
3. representation of another client will be or is likely to be adversely affected by such representation; or
4. the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.²

¹ D.C. R. of Prof'l Conduct 1.7(a).

² R. 1.7(b).

If a trade association's attorney also has an attorney-client relationship with a member, she may be required to withdraw from one or perhaps both representations if a conflict arises and consent is not obtained.³

General Rule: A Lawyer Who Represents an Association Does Not, Without More, Represent the Members. Ethics Opinion 305 reiterates the rule, stated in the District of Columbia Rule of Professional Conduct 1.13 and similar rules in other jurisdictions, that a lawyer who represents a trade association or other organization "represents the organization acting through its duly authorized constituents." Further, as stated in a comment to Rule 1.7, a lawyer who represents a trade association "is deemed to represent that specific entity, and not its . . . members or 'other constituents.'"

Several principles flow from the basic rule. Information that the trade association's attorney obtains from a member while the attorney is acting for the association is protected by the attorney-client privilege and the lawyer's duty to maintain her client's confidences. The privilege belongs to the trade association and not the member.⁴ In addition, a lawyer for a trade association is not prohibited from representing the association in a matter adverse to a member.⁵ In this circumstance, though, the association's lawyer should advise the member whose interest is adverse to that of the association of the conflict or potential conflict, that the lawyer cannot represent the member, and that the member may wish to obtain independent representation.⁶

Under What Circumstances Will an Attorney-Client Relationship Be Implied Between an Association's Attorney and a Member? Even though an attorney is deemed to represent the organization and not individual members of the organization, in some circumstances a trade association's lawyer will be found to represent a member of the association even though no retainer agreement has been executed and no invoices have been sent. If the circumstances surrounding the communications between the association's lawyer and the member are such that the member had a reasonable expectation of confidentiality and that the lawyer was acting on the member's behalf, an attorney-client relationship may be found by implication. In light of the potential consequences of being found to have an implied attorney-client relationship with a member, trade association counsel must guard against unwittingly stumbling into such situations.

In the leading case, *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), a law firm for an association also represented a party in a law suit adverse to some of the association's members. The members had previously provided confidential information to the law firm in connection with the association's legislative efforts. Emphasizing that the members had an expectation of confidentiality as well as a reasonable belief the law firm was acting for both the association and the members, the court upheld the law firm's disqualification.

The *Westinghouse* approach has been followed by the Legal Ethics Committee of the District of Columbia, which has said that: "[w]hat is most important is whether the member of the trade association disclosed confidential information to the association's lawyer, and the surrounding circumstances and expectations."⁷ Relevant factors in the analysis include:

³ D.C. R. of Prof'l Conduct 1.7, Comment [22].

⁴ D.C. Bar Ethics Op. No. 305, at 2 n.3.

⁵ *Id.* (citing Comment [13] to D.C. R. of Prof'l Conduct 1.7 and D.C. Bar Ethics Op. No. 216 (1991)).

⁶ D.C. R. of Prof'l Conduct 1.13, Comment [8].

⁷ D.C. Bar Ethics Op. No. 305, at 4.

- whether the lawyer affirmatively assumed a duty of representation to the member;
- whether the member had separate legal representation;
- whether the lawyer represented the member before he or she began representing the association;
- the nature of the disclosures that were made by the member to the attorney;
- the member's expectations of the attorney, and the reasonableness of those expectations;
- whether the member relied upon the attorney to represent its individual interests; and
- the size of the association (which may bear on the reasonableness of the member's expectation that the attorney was representing the member's individual interests).⁸

In *United States v. ASCAP*, 129 F. Supp. 2d 327 (S.D.N.Y. 2001), however, the court held that counsel for the American Society of Composers, Authors and Publishers did not have an attorney-client relationship with a member who was suing the association to recover royalties. The member argued that an attorney-client relationship existed because he had disclosed confidential information regarding his income and debts to ASCAP in order to receive advances against future royalties. In denying plaintiff's motion to disqualify ASCAP's counsel, the court pointed out that ASCAP's Articles of Association included a provision stating that ASCAP's counsel acts only on the association's behalf in all proceedings, including matters in which ASCAP and a member are adverse. *Id.* at 336.⁹

Are There Other Grounds on Which an Association's Lawyer Risks Disqualification? Even where an attorney-client relationship does not exist between the association's lawyer and a member, it may nevertheless be inappropriate for the lawyer to represent a client in a matter adverse to the member. An example of such a case is *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981), in which the Second Circuit affirmed the disqualification of an attorney from representing a former executive of an association member in a breach of contract suit against the member company. The same law firm also represented the association in collective bargaining. Applying a "substantial relationship" test, the district court found that plaintiff's counsel likely gained access to confidential information about the member's employment policies and practices through his work for the association, and disqualified the lawyer. Affirming, the Second Circuit stated the test as follows:

Disqualification will ordinarily be required whenever the subject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant. *Id.* at 750.

The "substantial relationship" test is incorporated in the D.C. Rules of Professional Conduct, which provide that, absent consent, a representation that is adverse to a member is improper if:

- a. the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client[;]
- b. during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets . . . of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or

⁸ *Id.* at 5. See also *United States v. ASCAP*, 129 F. Supp. 2d 327 (S.D.N.Y. 2001).

⁹ See also *Ocean Club of Palm Beach Shores Condo. Ass'n v. Estate of Daly*, 504 So.2d 1377 (Fla. App. 1987) (law firm for association could sue member of association); *L'Association Des Proprietaires v. Redwine*, 2002 WL 534137 (Cal. App. 2002) (former general counsel of homeowners' association could not represent former directors in suit against the association).

c. such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.¹⁰

As pointed out by D.C. Ethics Opinion 305, the D.C. Rules of Professional Conduct say that such situations raise “impairment of representation” concerns, without treating the member as an implied or “vicarious” client.¹¹

How Does a Joint Defense Agreement Change the Picture?

Counsel representing trade associations or their members in antitrust investigations or litigation often enter joint defense agreements. A complete discussion of the issues surrounding such agreements and the joint defense privilege, as it is commonly known, is beyond the scope of this article.¹² There are several potential problem areas, however, that require highlighting.

What Is the Joint Defense Privilege? The joint defense privilege is an extension of the attorney-client privilege. As described by the Second Circuit, the joint defense privilege serves “to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. Only those communications made in the course of an ongoing common enterprise and intended to further that enterprise are protected.”¹³ Similarly, the First Circuit has explained that “in order to establish the existence of the privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.”¹⁴

The joint defense privilege belongs to each party to the joint defense effort.¹⁵ Unless each party to the joint defense agreement consents to the privilege being waived, it can be waived only by subsequent litigation between the parties.¹⁶ Thus, the joint defense privilege provides members of a trade association with a protection against disclosure they might otherwise lack, since the general rule, as discussed above, is that the association’s lawyer represents only the entity.

Applications and Problems in the Trade Association Context.

- **Joint Defense Agreement as Basis for Antitrust Liability?** Counsel for trade association members sometimes react negatively when a joint defense agreement is proposed, out of concern that their company will incur antitrust exposure because it has signed a joint defense agreement and participated in a joint defense effort. Such concerns often are traceable to an early decision, *Jones Knitting Corp. v. Morgan*, 244 F. Supp. 235 (E.D. Pa. 1965), *aff’d in part and rev’d in part*, 361 F.2d 451 (3d Cir. 1966). The court held that restrictions contained in a joint defense agreement constituted a per se Sherman Act violation. The restrictions prevented signatories from entering settlement negotiations with a patent holder. The *Jones Knitting* decision has been criticized,¹⁷ and

*The joint defense
privilege belongs to
each party to the
joint defense effort.*

¹⁰ D.C. R. of Prof’l Conduct 1.7, Comment [14].

¹¹ D.C. Bar Ethics Op. No. 305, at 8 n.6.

¹² See generally ABA SECTION OF ANTITRUST LAW, ANTITRUST EVIDENCE HANDBOOK 92–95 (2d ed. 2002); ABA SECTION OF ANTITRUST LAW, HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS ch. 9 (3d ed. 2002).

¹³ *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (citation omitted).

¹⁴ *United States v. Bay State Ambulance*, 874 F.2d 20, 28 (1st Cir. 1989) (quoting *In re Beville, Bresler & Shulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986)).

¹⁵ *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990).

¹⁶ The Evidence Project, 171 F.R.D. 330, 525 (1997).

¹⁷ *Gould v. Control Laser Corp.*, 462 F. Supp. 685, 690–91 (M.D. Fla. 1978), *aff’d*, 650 F.2d 617 (5th Cir. 1981).

it appears inconsistent with current jurisprudence regarding the applicability of the per se rule to concerted refusals to deal. A more recent case, *Lemelson v. Bendix Corp.*, 621 F. Supp. 1122 (D. Del. 1985), involved a joint defense agreement to which a trade association and co-defendants in a patent infringement case were parties. The joint defense agreement required any party settling with the plaintiff to disclose the terms of the settlement to the other parties to the agreement. Rejecting the broad rule stated in *Jones Knitting*, the court held that the joint defense agreement did not support a claim of unlawful conspiracy under the Sherman Act.

• *Is Member Information Held by the Association Protected Against Disclosure?* As discussed above, the general rule is that the association alone, and not the individual association member, is the association lawyer's client. D.C. Bar Ethics Opinion 305 states that "[i]nformation obtained from a member while the lawyer is acting for the trade association is protected by the attorney-client privilege" and the lawyer's obligation to maintain her client's confidences.¹⁸ The opinion further points out, however, that "it is the trade association that holds the privilege, not the member."¹⁹ As previously discussed, in some circumstances, the member may have formed a reasonable belief that it was being represented individually by the attorney, in which case the attorney-client privilege and the lawyer's duty to maintain confidences apply to the member as well.²⁰ But in the absence of an implied representation, may the member's confidential communications be disclosed if the association decides to waive the attorney-client privilege? In this circumstance, the joint defense privilege is available to protect members against disclosure of their confidential information, provided appropriate steps have been taken to establish and preserve the privilege.

• *Will a Joint Defense Agreement Prevent the Association's Lawyer from Using Confidential Information in a Subsequent Engagement?* Joint defense agreements have obvious value, but counsel representing trade associations or individual members must understand that a joint defense agreement may affect his or her ability to accept subsequent representations. A 1995 formal ethics opinion of the ABA shows how a joint defense agreement may lead to ethical issues for an association's lawyer in subsequent matters.²¹ Though the fact pattern addressed by the ABA opinion did not involve a trade association, the opinion would apply in that context. ABA Formal Opinion 95-395 addressed the following situation: a lawyer worked in a firm whose practice concentrated on insurance matters. The lawyer routinely represented Insurance Company in matters where it had common interests with other insurance companies, and frequently participated in a "joint defense consortium." The lawyer then left the firm and was approached by a client that wanted him to file suit against other members of the consortium, on a matter related to consortium matters the lawyer handled while at the firm. Insurance Company, however, would not be involved in the suit.

The ABA opinion analyzed this question in terms of a lawyer's duty to preserve confidences implied in the circumstances of a joint defense, separately addressing the lawyer's obligations to his former client, Insurance Company, and the other members of the consortium. With regard to the former client, the ABA observed that the lawyer had an obligation under Model Rule of Professional Conduct 1.6 not to reveal "information relating to representation of a client" without the client's consent. Information obtained by the lawyer through the joint defense consortium, pur-

[C]ounsel representing trade associations or individual members must understand that a joint defense agreement may affect his or her ability to accept subsequent representations.

¹⁸ D.C. Bar Ethics Op. No. 305, at 2 n.3 (citing Comment [3] to D.C. R. of Prof'l Conduct 1.13 and D.C. Bar Ethics Op. No. 269).

¹⁹ *Id.*

²⁰ *Id.*

²¹ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995)].

suant to joint defense privilege, would fall within this definition “even though the information came not from Insurance Company but from another member of the consortium that was not represented by Lawyer.” Thus, Insurance Company’s consent would be required. “As a practical matter,” though, the ABA thought it was unlikely Insurance Company would consent to the representation. Having signed a joint defense agreement, it “could not give such consent without exposing itself to liability to the members of the consortium whose confidences were involved.”

ABA Formal Opinion 95-395 also addressed the lawyer’s responsibilities to members of the joint defense consortium who had not been his clients. The ABA said that even though they were never the lawyer’s clients, he had received information from them in confidence. While the lawyer did not owe an ethical obligation to the members of the consortium, he “would almost surely have a *fiduciary* obligation to the other members of the consortium, which might well lead to his disqualification.” In light of this, the lawyer would “at a minimum” be obligated to warn his prospective new client of possible limitations on his representation, arising from his prior representation of Insurance Company. Further, the lawyer should consider whether his new representation would be “materially limited” by his responsibilities to Insurance Company or other members of the consortium, thus requiring him to decline the representation.

Similar issues have been addressed in court decisions. In *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977) (per curiam), an attorney who had represented one of several parties involved in an antitrust grand jury investigation later sought to represent plaintiffs in a civil antitrust case against his former client’s co-defendants. The court held that because there was a substantial relationship in the subject matters of the two representations, and confidential information was shared pursuant to joint defense privilege in the first matter, the attorney would breach a fiduciary duty if he later used the information to the detriment of the former client’s co-defendants. More recently, in *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996), the Texas Supreme Court held that a lawyer was disqualified from representing plaintiffs in a lawsuit against a corporation because another lawyer in his firm previously had been retained by the corporation to represent an ex-employee in substantially related matters, and had received confidential information from the corporation pursuant to joint defense privilege. The court held that, even if the attorney could prosecute the suit without breaching the joint defense agreement, there would be a “strong appearance of impropriety.” While not involving trade associations, these cases illustrate the potential pitfalls awaiting a lawyer for an association or a member who receives confidential information pursuant to a joint defense agreement, and attempts to undertake a subsequent representation that is adverse to one of the participants in the joint defense effort.

Conclusion

The ethical and practical issues that may arise in the context of an antitrust investigation or lawsuit involving a trade association and its members are complex, but manageable. If representation arrangements are established only on the basis of near-term budgetary concerns or administrative convenience, there may be serious adverse consequences later on, including waiver of privilege and disqualification. Thus, foresight and early consideration of potential conflict and privilege issues are critical. ●